Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID DUFFY,

Petitioner,

v.

CHARLES R. WOLLE, HAROLD D. VIETOR, and RONALD E. LONGSTAFF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When should a District Court under Rule 56(f) of the Federal Rules of Civil Procedure either refuse summary judgment or order a continuance to permit discovery to be taken when presented with a timely affidavit by a party opposing summary judgment indicating an inability to demonstrate by affidavit facts essential to oppose summary judgment?

2. In considering a request to postpone a ruling on summary judgment under Rule 56(f) of the Federal Rules of Civil Procedure in a case maintained against public officials asserting a defense of qualified immunity what considerations should guide a District Court?

3. When and under what circumstances should a Plaintiff in a case of employment discrimination involving alleged disparate treatment be denied the opportunity to engage in discovery on the issue of pretext?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

The Petitioner is David Duffy.

The Respondents are Charles R. Wolle, Harold D. Vietor, and Ronald E. Longstaff, in their individual and official capacities. The Respondents are the Judges in active service of the United States District Court for the Southern District of Iowa.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, DAVID DUFFY, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above entitled proceeding on August 19, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 123 F.3d 1026 (8th Cir. 1997) and is reprinted in the appendix to this petition beginning at App. 1.

The decision and opinion of the United States District Court for the Southern District of Iowa is not published and is reprinted in the appendix to this petition beginning at App. 31.

JURISDICTION

The Petitioner invoked the jurisdiction of the District Court relying upon both *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and 28 United States Code §1331. On August 1, 1996 the District Court granted the Respondents' motion to dismiss considering it as a motion for summary judgment.

The Court of Appeals for the Eighth Circuit had jurisdiction of this case under 28 United States Code §1291. On August 19, 1997 the Court of Appeals entered a judgment and opinion affirming the judgment of the District Court. In its opinion it held that the Respondents

were entitled to summary judgment prior to discovery even though: 1) the Petitioner's complaint stated a viable constitutional claim against the Respondents; 2) the claim of the Petitioner was based upon law which was clearly established at the time his causé of action arose; and 3) the Petitioner had adequately demonstrated by affidavit a prima facie claim of reverse gender discrimination. The Court of Appeals further held that the District Court did not abuse its discretion in declining to afford the Petitioner discovery prior to granting summary judgment.

On October 29, 1997 the Court of Appeals denied Petitioner's request for rehearing with suggestions for rehearing en banc.

This Court has jurisdiction to review this case under 28 United States Code §1254.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Rule 56 of the Federal Rules of Civil Procedure:

> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

This case was decided by the District Court on a motion to dismiss which was treated by it as a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of a genuine dispute of fact on an element essential to his case and upon which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

On December 7, 1993 Edwin Ailts submitted to the Respondents his resignation as Chief United States Probation Officer for the United States District Court for the Southern District of Iowa which would become effective

on April 29, 1994. Earlier, he had informed them of his intention to resign.

The Respondents as the judges in active service of the United States District Court for the Southern District of Iowa had the administrative responsibility to appoint Mr. Ailts' successor under 18 United States Code §3602.

In the fall of 1993 the Respondent, Charles Wolle, as the Chief Judge of the Court attended a conference in Washington D.C. sponsored by the Administrative Office of the United States Courts. According to him he was informed that in selecting a new Chief Probation Officer the Respondents should advertise the position in a publication of national circulation to reach all persons who might be interested in order to secure an open, nationwide and diverse pool of qualified applicants. Upon his return from the conference he had a conversation with Mr. Ailts, who recalls that Judge Wolle informed him that while in Washington he had received information about an interest in the appointment of a female. Mr. Ailts assumed he was referring to the Chief Probation Officer position since he had only recently announced his intention to retire and that was the only vacant position which existed. Thereafter, Mr. Ailts had a conversation with the Petitioner. According to the Petitioner Mr. Ailts informed him that Judge Wolle had recently returned from a conference with the Administrative Office of the United States Courts and had been encouraged to engage in an aggressive effort to recruit minorities and females as candidates for the position of Chief Probation Officer.

After becoming aware of Mr. Ailts' intention to retire the Respondents established a screening panel to review all applications submitted for the position of Chief Pro-

bation Officer and to submit a list of three to seven applicants who would be interviewed for that position by the Respondents. Included on that committee were Judge Longstaff and Mr. Ailts. They also prepared a vacancy announcement which was published in *News and Views*, a publication of the Probation Division of the Administrative Office of the United States Courts, which advertised the Chief Probation Officer position. The announcement described the position and its duties, set forth the qualifications for the position and described the application process. In order to be qualified for the position an applicant was required to have a four year degree and preferably an advanced degree from an accredited college with specialization in one or more of the social sciences which were appropriate to the position as well as progressively more responsible specialized experience, including management responsibility, in the investigation, supervision, counseling and guidance of offenders in community corrections or pre-trial programs. The duties of the position included: a) organizing the probation office to effectively handle the investigation and supervision of pre-trial cases and probationers; b) recruiting and supervising the staff of the probation office; c) preparing estimates of personnel needs and operating budgets; d) soliciting and negotiating substance abuse and mental health care service contracts; e) maintaining a liaison with the Court and a cooperative relationship with other organizations involved with the criminal justice system; and f) reviewing and interpreting various requirements for the administration of the probation office and promulgating policies needed to meet those requirements.

The screening committee decided that any applicant who was currently employed by the probation office

would be included among the applicants submitted to the Respondents for an interview. It submitted to the Respondents the names of three candidates, the Petitioner, L. Jane McPhillips and John Stites. The Petitioner and Mr. Stites were current employees of the probation office while Ms. McPhillips was a probation officer in the District of Minnesota.

The Petitioner held a master's degree with emphasis in rehabilitation, psychological counseling and corrections and had pursued doctoral studies in educational and school psychology. He had been employed as a probation officer in the Southern District of Iowa since 1974 and in early 1994 was its Chief Deputy Probation Officer. During his years of service in the probation office the Petitioner had held both line, supervisory and administrative positions in each of the three functional areas of the probation office. He had served as both a pre-trial service officer and a supervisor in the pre-trial unit. He was a pre-sentence writer in the pre-sentence unit and for four years when the Chief Probation Officer was absent was responsible for supervising that unit. He had served as a probation officer in the supervision unit and for four years had supervisory responsibility for that unit. His administrative assignments in the probation office included serving as the pre-trial division coordinator, the training coordinator, the sentencing guidelines expert and the drug treatment contract specialist. He had developed the drug treatment program of the probation office which was utilized with respect to most individuals who came under its jurisdiction. He began performing supervisory responsibilities in 1989 and by 1994 was the second highest ranking official in the probation office. During absences by the Chief Probation Officer the Peti-

tioner assumed supervisory responsibilities for the probation office and filled in for the Chief Probation Officer periodically at executive meetings. He had received management training and had attended training seminars conducted for Chief Probation Officers. Throughout his employment in the probation office he was consistently given the highest performance ratings.

Ms. McPhillips had both a master's degree and a law degree. She had served as a probation officer since 1972 in both the Northern District of Texas and the District of Minnesota. Unlike the Petitioner Ms. McPhillips' background was limited to only one of the functional units of the probation office and she had less supervisory and administrative experience than the Petitioner. Most of her background consisted of working as a line probation officer in the area of presentence investigation. She had also served temporary duty positions with both the Administrative Office of the United States Courts and the United States Sentencing Commission.

The Respondents interviewed each of the three applicants referred to them by the screening committee. During his interview the Petitioner was asked what he would do if he did not receive the position of Chief Probation Officer.

The Respondents were personally familiar with both the Petitioner and John Stites who worked in the probation office. They were unfamiliar with Ms. McPhillips. They secured favorable recommendations for her from several of the sitting judges of the District of Minnesota. When asked by Judge Longstaff for a recommendation Mr. Ailts, who was also serving as a member of the screening committee, recommended the Petitioner for Chief Probation Officer.

Following the interviews the Respondents selected L. Jane McPhillips for the position. Thereafter, the Petitioner spoke with both Judge Longstaff and Judge Wolle concerning the selection decision. During these conversations he was given no reason why he was not awarded the position and was encouraged by Judge Wolle to continue pursuing his "cutting edge ideas" for the operation, management and development of the probation office.

Following his appointment to the federal bench in 1987 Judge Wolle has employed eight individuals to serve him as law clerks. Six of those individuals were females. Judge Longstaff following his appointment to the bench in 1991 had employed nine different individuals as law clerks, only one of whom was a male.

The Petitioner initiated this proceeding before the District Court contending that he was the victim of gender discrimination in being passed over for the Chief Probation Officer position contrary to his rights under the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution.[1] The Respondents' initial response to the lawsuit came in the form of a combined motion to dismiss and a motion for summary judgment maintained under Rules 12(B)(6) and 56 of the Federal Rules of Civil Procedure. In their motion the Respondents advanced five reasons why the Petitioner's claim was infirm as a matter of law. Additionally, each of the Respondents submitted an affidavit claiming that gender was not a reason behind the selection decision

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[1] Because of his status as an employee of the Court the Petitioner is not a member of the competitive service and thus is not protected by Title VII of the "Civil Rights Act of 1964".

and that Ms. McPhillips was determined by them to be the best qualified candidate for the position.

The Petitioner's submission to the District Court in response to the Respondents' motion included the affidavits of Mr. Ailts, his counsel and himself.[2] The District Court rejected the contention of the Respondents that the Petitioner's claim was infirm as a matter of law. It did, nonetheless, grant the Respondents' motion for summary judgment relying upon *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) and the doctrine of qualified immunity. While acknowledging that the Petitioner's constitutional claim was based upon law which was clearly established at the time of the alleged wrong, it rejected his claim after reviewing the Respondents' affidavits reasoning that the Petitioner had "insufficient support for his claims" and policy considerations mandate the dismissal of his claim to avoid subjecting federal officials to the expense and distraction of trial.

Although not adopting the analysis of the District Court the Eighth Circuit, nonetheless, affirmed its decision. Like the District Court it rejected the Respondents' challenge to the legal sufficiency of the Petitioner's claim. It further concluded that his claim was predicated

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[2] The affidavit of the Petitioner's counsel was submitted pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. It requested the opportunity to engage in limited discovery before the District Court ruled upon the fact based components of the Respondents' motion. In this respect it indicated that the Petitioner was prepared to make a factual showing of the necessary elements of his prima facie claim, but requested the opportunity to engage in discovery with respect to the reasons advanced by the Respondents for their selection decision prior to the Court determining whether a genuine issue of fact existed as to whether those reasons were pretextual.

upon clearly established law and recognized that the Petitioner had made a satisfactory factual showing of a prima facie claim of reverse gender discrimination. Once determining the Petitioner's claim was based upon clearly established law it undertook an analysis of the merits of his claim recognizing that at that point "the defense of qualified immunity begins to look like a ruling on the merits". It concluded that the Petitioner was unable to demonstrate the existence of a genuine issue of fact that the reasons advanced by the Respondents for promoting the female as set forth in their affidavits were pretextual. It went on to conclude that the District Court did not abuse its discretion in denying the Petitioner the opportunity to engage in discovery since "Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation."

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Rule 56(f) of the Federal Rules of Civil Procedure permits but does not require a District Court to either decline or defer ruling upon a motion for summary judgment in order to allow the nonmovant to obtain evidence or take discovery when by affidavit he presents reasons why he cannot present by affidavit facts essential to his opposition. The Rule does not set forth factors which should guide the District Court in exercising this discretion.

This case presents the question of when and under what circumstances it is proper under the foregoing rule to deny an opponent of summary judgment the opportu-

nity to take any discovery prior to a ruling on a fact based motion for summary judgment. Both the District Court and the Eighth Circuit concluded that the Respondents were entitled to summary judgment because of the Petitioner's inability to present evidence sufficient to create a genuine issue of material fact that the reasons given by the Respondents for not promoting him were pretextual.

The Petitioner through his counsel's affidavit made a timely request to the District Court that it defer ruling upon the Respondents' motion for summary judgment until the Petitioner conducted discovery and had the opportunity to depose each of the Respondents in order to gather evidence to make a presentation that the Respondents' explanation for their actions was a pretext for unlawful discrimination. At the time this request was made the Petitioner had demonstrated that: 1) his claim under the Fifth Amendment was sufficient as a matter of law; 2) the legal defenses advanced by the Respondents to the Petitioner's claim were without merit; 3) his claim was based upon law which was clearly stated at the time of the alleged wrong; and 4) he had facts sufficient to demonstrate a prima facie claim of reverse gender discrimination. Because the Respondents' effort to dismiss his claim came at the threshold stage of the case the Petitioner had no opportunity to engage in any discovery prior to the District Court's ruling.

In the event it issues a writ of certiorari this Court would consider how a District Court should exercise its discretion under Rule 56(f) when: a) the party opposing summary judgment has not been dilatory in seeking discovery and has demonstrated the legal sufficiency of his claim; b) the evidence needed to combat summary judg-

ment lies peculiarly within the possession of the movant and is not readily accessible absent discovery; and c) the defendants are public officials entitled to qualified immunity.

For several reasons the questions raised in this petition warrant consideration by this Court.

First, summary judgment is playing an increasingly more important role in the administration of the civil justice system and because of its increasing importance this Court's guidance concerning the proper exercise of the discretion given to the District Courts under Rule 56(f) would be valuable.

Second, the holding of the Eighth Circuit is in direct conflict with other circuits as to when summary judgment should be granted when the party opposing summary judgment has had no prior opportunity to engage in discovery.

Third, the holdings of both the District Court and the Eighth Circuit appear to be sensitive to the status of the Respondents as public officials entitled to qualified immunity. Thus, this case raises the question of how Rule 56(f) should be reconciled with the qualified immunity doctrine. On this important issue of federal law the decision of the Eighth Circuit appears to conflict with relevant decisions of this Court. Further, there is need for this Court to clarify what a plaintiff must establish as a precondition to discovery when confronted with a qualified immunity defense.

Finally, the decision of the Eighth Circuit approves granting summary judgment to an employer in an employment discrimination case prior to affording the claimant an opportunity to engage in discovery when the

disputed factual issue turns upon the employer's motivations for the challenged action. In its opinion it decides an important question of federal law in a manner which conflicts with relevant decisions of this Court.

I. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL CONCERNING A MATTER OF IMPORTANCE IN THE ADMINISTRATION OF THE CIVIL JUSTICE SYSTEM

Prior to 1986 summary judgment was commonly considered a drastic remedy sparingly employed in the disposition of civil lawsuits. In *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986) this Court dispelled that notion and recognized that summary judgment is an important tool in the civil justice system to secure a just, speedy and inexpensive determination of controversies. It concluded that Rule 56 must be applied with an appropriate sensitivity to not only the rights of individuals having sufficient evidence to warrant trial by jury, but also to those individuals opposing claims that have no factual basis. Thus, a moving party is entitled to summary judgment as a matter of law if the nonmovant fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corporation*, 477 U.S. at 323.

The Eighth Circuit correctly recognized that in order to ultimately prevail with respect to the merits of his claim the Petitioner must at the very least demonstrate that the reasons advanced by the Respondents for not appointing him Chief Probation Officer were pretextual. It reasoned that the Respondents through their affidavits had set forth nondiscriminatory reasons for selecting the

female candidate over the Petitioner and the Petitioner failed to make a sufficient factual showing that those reasons were pretextual.[3] Although recognizing that the Petitioner had made a sufficient factual showing of a prima facie claim of reverse discrimination it concluded that the District Court did not abuse its discretion in denying the Petitioner the opportunity to engage in discovery before granting the Respondents' summary judgment because the Petitioner "made no supportable allegations of discrimination" and discovery would involve a "fishing expedition" on the part of the Petitioner to uncover further evidence of gender discrimination.[4]

Even though the information needed by the Petitioner to rebut the Respondents' explanations for the selection decision was within the control of the Respondents and

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[3] Although the Petitioner's claim of gender discrimination arose under the Constitution rather than Title VII of the "Civil Rights Act of 1964" the Eighth Circuit evaluated the evidence in the summary judgment proceeding under the indirect proof method first permitted by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). The use of that proof model has been approved in purposeful discrimination claims maintained upon the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79 (1986).

[4] The Eighth Circuit in its opinion took note of the Petitioner's failure to contest the assertions of the Respondents that the female applicant received "glowing recommendations from Minnesota jurists" and the Respondents' perceptions of her interviewing skills. Information relating to those subjects was exclusively under the control of the Respondents and absent the opportunity to engage in discovery the Petitioner was not able to explore how the recommendations of the Minnesota jurists with respect to the female were more compelling than Mr. Ailts' recommendations with respect to the Petitioner or the relative performances of the female and the Petitioner during their interviews.

not readily accessible to the Petitioner absent discovery and the Petitioner had no prior opportunity to engage in discovery the Eighth Circuit, nonetheless, concluded that the District Court did not abuse its discretions in denying the Petitioner's Rule 56(f) request that the summary judgment ruling be postponed. Its holding in this respect is in direct conflict with the holdings from several of its sister circuits.[5]

In *Dunkin' Donuts of AM. v. Metallurgical Exoproducts*, 840 F.2d 917, 919 (Fed. Cir. 1988) the Federal Circuit concluded that a trial court abused its discretion in granting summary judgment without affording the party opposing summary judgment who had made a Rule 56(f) request a reasonable opportunity to engage in discovery.

In *Meloff v. New York Life Insurance Company*, 51 F.3d 372, 375 (2nd Cir. 1995) the Second Circuit concluded that the District Court abused its discretion in granting summary judgment in an employment discrimination case where the Plaintiff was unable to make a factual showing of pretext and refusing to defer its con-

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[5] In *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir. 1997) the Eighth Circuit in another case involving public officials in which qualified immunity was at issue recognized the right of a party opposing summary judgment to submit a Rule 56(f) affidavit, but required such an affidavit to explain "in detail" what evidence could be obtained if the court delayed a summary judgment ruling. It further held that absent such a specific showing Rule 56(f) does not condone a fishing expedition. Thus, the Eighth Circuit has developed a very restrictive test for determining when a District Court might properly exercise its discretion to defer ruling on a motion for summary judgment to enable the opposing party to undertake discovery.

sideration of that motion until the plaintiff had reasonable opportunity to conduct further discovery.

In *San Filippo v. Bongiovanni*, 30 F.3d 424, 432 (3rd Cir. 1994) the Third Circuit held that a trial court abused its discretion in denying a plaintiff in an employment discrimination case the opportunity to conduct discovery before ruling on the employer's motion for summary judgment. It reasoned that where relevant information sought is in the hands of the moving party a District Court should grant the nonmovant relief under Rule 56(f) almost as a matter of course.

In *Wichita Falls Office Associates v. Banc One Corporation*, 978 F.2d 915, 918-920 (5th Cir. 1992) the Fifth Circuit determined that the trial court abused its discretion under Rule 56(f) in granting summary judgment without allowing the nonmovant the opportunity to pursue further discovery recognizing that the continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the nonmovant has not diligently pursued discovery.

In *Evans v. Technologies Applications & Service Company*, 80 F.3d 954, 961 (4th Cir. 1996) the Fourth Circuit although affirming summary judgment nonetheless recognized that when a proper request is made by a nonmovant under Rule 56(f) summary judgment must be refused where the nonmoving party has not had the opportunity to discover information essential to its opposition.

In *Vance v. United States*, 90 F.3d 1145, 1148-1149 (6th Cir. 1996) and *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-232 (6th Cir. 1994) the

Sixth Circuit recognized that a District Court's entry of summary judgment without permitting a party to conduct any discovery will constitute an abuse of discretion if the party opposing summary judgment makes a proper and timely showing of the need for discovery.

In *Burns v. Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990) the Eleventh Circuit in a case of employment discrimination concluded that the trial court abused its discretion in ruling on a motion for summary judgment when the party opposing the motion had not received responses to its outstanding discovery requests because the responses could have had a direct bearing on his ability to respond to the employer's motion for summary judgment.

Thus, the Second, Third, Fourth, Fifth, Sixth, Eleventh, and Federal Circuits when confronted with a situation similar to the present case have all concluded contrary to the Eighth Circuit that it is an abuse of discretion for a District Court to grant summary judgment without affording the opponent an opportunity to engage in discovery.

Although this Court has not addressed the specific issue presented in this case it has nonetheless recognized the importance of a party opposing summary judgment to have a fair opportunity to engage in discovery with respect to matters relevant to the issues in the summary judgment proceeding.

In *Celotex Corp.*, 477 U.S. at 322-323 it recognized that summary judgment should be granted when a nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, but only after he has had

adequate time for discovery. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) it recognized that a party opposing summary judgment must set forth specific facts showing that a genuine fact issue remains for trial, but qualified that observation by noting that Rule 56(f) contemplates that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. *Anderson* at footnote 5.

II. THE DECISION OF THE EIGHTH CIRCUIT ENDORSES AN UNWARRANTED EXTENSION OF THE QUALIFIED IMMUNITY DOCTRINE

The District Court in granting summary judgment squarely relied upon the qualified immunity doctrine holding that the Petitioner's claim had insufficient evidentiary support and good policy mandated that federal judicial officers not be exposed to the expense and distraction of trial. The Eighth Circuit although not squarely embracing that rationale was nonetheless sensitive to the Respondents' status as members of the federal judiciary entitled to qualified immunity. In its opinion it cites with approval the decision of the Tenth Circuit in *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) and reasons that Rule 56(f) should not be utilized to enable a plaintiff to conduct a fishing expedition which would be disruptive to the federal judiciary. Thus, the holding of the Eighth Circuit creates a tension between Rule 56(f) and the qualified immunity doctrine.

Clearly public officials including federal judges are entitled under qualified immunity to the resolution of insubstantial claims on summary judgment in order to be spared the burden of trial or broad reaching discovery

in cases where the legal norms which the officials are alleged to have violated are not clearly established at the time of the alleged misconduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982). In *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) this Court stated:

> "Unless the plaintiff's allegations state a claim of violation of clearly established law a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery—even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law" [p.526].

It went on to recognize the separability between qualified immunity and the underlying merits of a plaintiff's claim stating that a claim of immunity need not consider the correctness of the plaintiff's version of the facts but rather whether the legal norms alleged to be violated by the defendant were clearly established at the time of the alleged wrong.[6]

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[6] This Court in *Johnson v. Jones*, 515 U.S. 304 (1995) also recognized the conceptual distinctness of qualified immunity from the factual merits of the underlying claim. It observed that the factual inquiry with respect to a qualified immunity defense does not turn upon the correctness of the plaintiff's version of the facts.

Thus, in the wake of *Mitchell* the defense of qualified immunity appears to involve a three prong inquiry. First, has a plaintiff asserted a violation of a constitutional right. Second, if the plaintiff has made such an assertion was the right clearly established at the time of the alleged wrong. Third, is there any genuine issue of material fact as to whether a reasonable official given the factual context of the claim would have known that his alleged actions violated such a right.

Both the Eighth Circuit in this case and the Tenth Circuit in *Bryant* create an additional hurdle which a claimant must leap in order to pursue discovery in a claim maintained against a federal judge by essentially requiring him as a precondition to the right to engage in discovery to demonstrate the existence of evidence sufficient to withstand summary judgment on each element for which he bears the burden of proof. Thus, contrary to dictates of this Court in both *Mitchell* and *Johnson* the Eighth Circuit in this case as well as the Tenth Circuit in *Bryant* have intertwined the defense of qualified immunity with the underlying factual merits of a plaintiff's claim.

Notwithstanding *Mitchell* it remains unclear concerning the burden a plaintiff must satisfy when confronted with a qualified immunity defense in a case involving the intent of public officials before being entitled to embark upon discovery. In his concurring opinion in *Siegert v. Gilley*, 500 U.S. 226 (1991) Mr. Justice Kennedy adopted the view of the District of Colombia Circuit suggesting that upon being presented with a qualified immunity defense a plaintiff must present specific, nonconclusionary allegations which would establish the requisite intent through either direct or circumstantial evidence

before engaging in discovery. This Court has neither embraced nor rejected that view. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) this Court held that imposing a civil rights plaintiff with a heightened pleading requirement in a section 1983 claim against a municipal body could not be squared with Rule 8 of the Federal Rules of Civil Procedure. It specifically did not decide whether the federal courts may employ a heightened pleading standard in qualified immunity cases. Thus, it remains unsettled what, if anything, a plaintiff must do in a constitutional claim of employment discrimination after demonstrating that his claim is predicated upon clearly stated law in order to advance to discovery. In view of the frequency in which the defense of qualified immunity arises in claims against public officials the guidance of this Court on that question is of some importance.

III. THE OPINION OF THE EIGHTH CIRCUIT EFFECTIVELY DENIES A PLAINTIFF IN AN EMPLOYMENT DISCRIMINATION CLAIM A FULL AND FAIR OPPORTUNITY TO REBUT THE NONDISCRIMINATORY EXPLANATION ADVANCED BY AN EMPLOYER AS A JUSTIFICATION FOR ITS DECISION

In *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) this Court established an allocation of the burden of production of evidence and the order for the presentation of proof in an employment discrimination claim of disparate treatment. Under this scheme a plaintiff has an initial obligation to present evidence creating a presumption that the employer unlawfully discriminated against him. If he does, the employer bears the burden of producing evidence consisting of an

explanation that the challenged action was taken for legitimate, nondiscriminatory reasons.

If the defendant carries this burden of production the presumption of discrimination previously created by the plaintiff is rebutted. He then has "the full and fair opportunity to demonstrate" that the proffered reason was not the true reason for the employment decision and that prohibited discrimination was. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981). A fact finder's disbelief of the reasons put forward by an employer as justification for its actions coupled with the evidence advanced by a plaintiff in support of his prima facie claim is sufficient to permit, but not compel, a trier of fact to infer the ultimate fact of intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In a claim of employment discrimination the motive or intent of the employer for its action is generally the critical issue in dispute. Typically, evidence turning upon its motives and particularly the legitimacy of an employer's explanation for its decision lies within the possession of the employer and absent discovery is not readily accessible to a claimant. The holding of the Eighth Circuit in this case implicates the burden of a plaintiff in advancing an intentional discrimination claim. The Eighth Circuit in this case permitted a District Court in exercising its discretion under Rule 56(f) to effectively require a plaintiff in an employment discrimination claim as a prerequisite to discovery to present evidence sufficient to not only establish a prima facie claim of discrimination but also to discredit the explanation offered by the employer for its actions. Such a holding would have a chilling effect on claimants' efforts in

advancing claims of employment discrimination since such evidence oftentimes rests within the province of the employer. It also deviates from this Court's admonition in *Burdine* that a plaintiff be afforded a full and fair opportunity to challenge his employer's justifications for its actions. If the plaintiff is unable to engage in discovery with respect to the bases for the employer's decision then a full and fair opportunity is denied.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the questions in this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3210

David A. Duffy,

Appellant,

v.

Charles R. Wolle, Harold D. Vietor; Ronald Longstaff, Sued As Ronald E. Longstaff,

Appellees.

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: March 13, 1997
Filed: August 19, 1997

Before WOLLMAN AND MAGILL,[1] Circuit Judges, and GOLDBERG,[2] Judge.

MAGILL, Circuit Judge.

David Duffy sought to be appointed to the position of Chief United States Probation Officer (CUSPO) for the

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[1] The Honorable Frank J. Magill was an active judge at the time this case was submitted and assumed senior status on April 1, 1997, before the opinion was filed.

[2] THE HONORABLE RICHARD W. GOLDBERG, Judge, United States Court of International Trade, sitting by designation.

United States District Court for the Southern District of Iowa. A panel of three United States District Judges for the Southern District of Iowa, comprised of Chief Judge Charles R. Wolle, Judge Harold D. Vietor, and Judge Ronald E. Longstaff (Panel), appointed a female applicant to the CUSPO position. Because the Panel did not appoint him, Duffy subsequently brought this *Bivens* action against the Panel, alleging a Fifth Amendment due process violation for the denial of equal protection through the practice of reverse discrimination. The district court[3] granted summary judgment to the Panel, and Duffy now appeals. We affirm.

I.

On April 29, 1994, Edwin Ailts resigned from the CUSPO position for the United States District Court for the Southern District of Iowa. Ailts had served as a probation officer since 1963 and as the CUSPO for the Southern District of Iowa since 1974. Although Ailts tendered his formal resignation on December 7, 1993, he had notified the Panel during the Fall of 1993 of his intention to resign.

The Panel had the statutory authority to appoint a successor to Ailts to fill the CUSPO position in the Southern District of Iowa. *See* 18 U.S.C. § 3602. On September 30 and October 1, 1993, Chief Judge Wolle attended a conference in Washington, D.C., presented by the Administrative Office of the United States Courts. While at the conference, Chief Judge Wolle states that he

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[3] The Honorable William G. Cambridge, Chief Judge, United States District Court for the District of Nebraska.

> was informed that when [the Panel] needed to select a replacement for Edwin Ailts, our chief probation officer, [the Panel] should advertise the position in a publication of national circulation to reach all persons who might be interested so [the Panel] could have an open, nationwide, diverse pool of qualified applicants.

Wolle Aff. (Apr. 30, 1996) at 1-2, ¶ 2, *reprinted in* I J.A. at 17-18, Tab 5. In an affidavit, Ailts recounts that:

> At some time following the time I informed the [Panel] of my intention to retire I had a passing conversation with Judge Charles Wolle. At that time he had recently returned from Washington, D.C. He made a comment that while in Washington he had received information about an interest in the appointment of a female. At this time I cannot recall the specific entity that he indicated expressed that interest to him. I assumed at that time that he was referring to the Chief Probation Officer position which would be vacated upon my retirement since I had only recently indicated my intention to retire and I was unaware of any other vacant positions. This was a brief conversation with Judge Wolle and the comment was made by him in passing.

Ailts Aff. (June 14, 1996) at 1-2, ¶ 3, *reprinted in* II J.A. at 143-44, Tab 14. Duffy contends that:

> In October of 1993 I had a conversation with Mr. Ailts. During that conversation he informed me that Charles Wolle, the Chief Judge of the COURT, had recently returned from a conference in Washington with the Administrative Office of the United States COURTS. He informed Mr. Ailts that the Administrative Office was recommending an aggressive effort on the part of the COURT to recruit minorities and females as can-

didates for the Chief Probation Officer position which was becoming vacant.

Duffy Aff. (June 13, 1996) at 8, ¶ 20, *reprinted in* II J.A. at 124, Tab 10.

The Panel prepared a vacancy announcement for the CUSPO position and posted it in *News and Views*, a bi-weekly publication of the Probation Division of the Administrative Office of the United States Courts that was circulated nationwide to all probation officers. The vacancy announcement stated that, to be qualified for the CUSPO position, an applicant must possess "[a] 4-year degree from an accredited college or university with specialization in one or more of the social sciences appropriate to the position to be filled. An advanced degree in an appropriate area is preferred. In addition . . . applicants must possess [at least six] years of specialized experience. . . ." I J.A. at 25, Tab 5. The required "specialized experience" included "[p]rogressively responsible experience, including management responsibility, in the investigation, supervision, counseling, and guidance of offenders in community corrections or pretrial programs." *Id.* The vacancy announcement also explained that, as part of his duties, a CUSPO "[r]eviews, analyzes, and interprets statutory, Judicial Conference, and Parol Commission requirements for administration of probation and parole services; promulgates policies, procedures and guidelines needed to meet these requirements . . . ." *Id.*

The Panel created a screening committee to review applications for the CUSPO position. The screening committee members included Judge Longstaff, Ailts, Don Nickerson, who was the United States Attorney for the Southern District of Iowa, and Paul Zoss, who was the Federal Public Defender for the Southern District of

Iowa. The screening committee was to select three to seven of the best qualified candidates for the CUSPO position and refer those applicants to the Panel.

The screening committee received sixteen applications for the CUSPO position. As a courtesy to applicants who were currently employed as probation officer for the Souther District of Iowa, the screening committee elected to forward all such applicants to the Panel for consideration. The screening committee ultimately forwarded three names to the Panel: Jane McPhillips, who was a supervising United States Probation Officer for the District of Minnesota; Duffy, who was a Supervising United States Probation Officer for the Southern District of Iowa; and John Stites, who was a Senior United States Probation Officer for the Southern District of Iowa.

McPhillips had worked as a United States Probation Officer since 1972, and had been a supervising probation officer since 1990. During her tenure, McPhillips had served in the District of Minnesota office, the Northern District of Texas office, and in temporary duty positions with the Administrative Office of the United States Courts and the United States Sentencing Commission. McPhillips held a bachelor's degree in psychology, a master's degree in counseling and guidance, and a juris doctorate. McPhillips had been a licensed attorney since 1985, and was a member of the state bar of Texas.

Duffy had served as a United States Probation Officer since 1974, and had served as a supervising probation officer since 1990. Duffy had served only in the Southern District of Iowa. Duffy held a bachelor's degree in psychology, a master's degree with an emphasis in rehabilitation, psychological counseling, and corrections, and in

1971-72 had participated in, but had not completed, an educational and school psychology doctoral program.

A full description of Stites's qualifications is not contained in the record. *See* I J.A. at 34-36, Tab 5 (incomplete resume of John Stites). It appears, however, that Stites had less experience than either McPhillips or Duffy as a probation officer, *see id.* at 34 (noting that Stites was employed in 1976 by the Bi-State Metropolitan Planning Commission in Rock Island, Illinois), and there is no indication that Stites had ever earned an advanced degree.

The Panel interviewed each of the applicants. While the members of the Panel were personally familiar with Duffy's and Stites's work, Panel members contacted judges in Minnesota to obtain other jurists' impressions of McPhillips. Judge Vietor explained that he "spoke personally with Judge James Rosenbaum and Senior Judge Harry MacLaughlin of the United States District Court for the District of Minnesota," and that they "spoke very well of Ms. McPhillips'[s] abilities and unequivocally and highly recommended her for the position of Chief Probation Officer." Vietor Aff. (Apr. 26, 1996) at 2, par. 4, *reprinted in* I J.A. at 99, Tab 6. Judge Longstaff stated that he had spoken with Chief Judge Magnuson and Judge Rosenbaum of the District of Minnesota. "Both judges were highly complimentary in their praise and recommendation of Ms. McPhillips." Longstaff Aff. (May 1, 1996) at 4, ¶ 5, *reprinted in* II J.A. at 104, Tab 7.

In addition, the Panel received recommendations regarding McPhillips and Duffy from their current supervisors. Ailts, Duffy's outgoing supervisor, recommended that Duffy be appointed. *See* Ailts Aff. at 2, ¶ 5, *reprinted in* II J.A. at 144, Tab 14. Glenn Baskfield, CUSPO for

the District of Minnesota and McPhillips's supervisor, advised the Panel that "there is little doubt that [McPhillips] would make an excellent Chief Probation Officer." I J.A. at 41, Tab 5.

The Panel unanimously agreed to appoint McPhillips to the position of CUSPO for the Southern District of Iowa. Each member of the Panel has unequivocally declared that McPhillips was the best candidate for the position, and that her gender did not play a role in their decision to appoint her. Chief Judge Wolle stated that:

> At no time during the selection process did gender play any role in our consideration of the applicants. I voted to select McPhillips because she was the most qualified person by reason of her experience, her education, her demeanor during the interview, the letters of reference received with her resume, and the uniformly very complimentary comments of the Minnesota district judges and court officers we phoned.

Wolle Aff. at 3-4, ¶ 8, *reprinted in* I J.A. at 19-20, Tab 5. Judge Vietor stated that:

> I independently concluded that Ms. McPhillips was the best qualified applicant for the position. I was impressed with Ms. McPhillips'[s] experience, which included significant supervisory responsibility in the District of Minnesota. I was also impressed with Ms. McPhillips'[s] academic accomplishments which included going to law school and obtaining a juris doctor degree while she was serving as a probation officer in Minnesota. Ms McPhillips'[s] attributes also included extensive legal and practical experience with the Federal Sentencing Guidelines. One or more of the Minnesota judges I spoke with also commented on her excellent interpersonal skills with staff,

> and I considered that a good attribute. In reaching my conclusion I did not in any way consider the gender of Ms. McPhillips or the gender of Mr. Duffy and Mr. Stites. Gender of the three was not mentioned in discussions among Chief Judge Wolle, Judge Longstaff and myself.

Vietor Aff. at 2-3, ¶ 5, *reprinted in* I J.A. at 99-100, Tab 6. Judge Longstaff stated that:

> It was my opinion that Ms. McPhillips was the best qualified person of the three finalist applicants to assume the responsibilities of Chief Probation Officer. In coming to this conclusion, I was influenced not only by Ms. McPhillips'[s] strong academic background and work experience but also by the recommendations which I had received during phone conversations from Chief Judge Magnuson and Judge Rosenbaum . . . . Ms. McPhillips'[s] gender played no role whatsoever in the [Panel]'s deliberations.

Longstaff Aff. at 3-4, ¶ 5, *reprinted in* 103-04, Tab 7. On March 14, 1994, the Panel entered an order appointing McPhillips as CUSPO for the Southern District of Iowa beginning May 2, 1994. *See* I J.A. at 43, Tab 5.

Subsequently, Duffy spoke with Judge Longstaff during a fifty-minute meeting about the Panel's decision to appoint another candidate, and Judge Longstaff told Duffy that "it had been a very difficult decision . . . ." Duffy Aff. at 10, ¶ 24, *reprinted in* II J.A. at 126, Tab 10. During a five- to ten-minute conversation between Chief Judge Wolle and Duffy, Chief Judge Wolle stated that he understood Duffy's disappointment, and "encouraged [Duffy] to pursue what he called [Duffy's] 'cutting edge ideas' for the operation, management and development of the PROBATION OFFICE which [Duffy] had present-

ed in [his] interview." *Id.* at 10-11, ¶ 26, *reprinted in* II J.A. at 126-27, Tab 10.

Although the Southern District of Iowa had in place an Equal Employment Opportunity Plan (EEO Plan) that provided a mechanism for pursuing complaints of employment discrimination, Duffy did not access any administrative remedies. Instead, on March 8, 1996, Duffy filed a *Bivens* action against the Panel. In his complaint, Duffy alleged that the Panel had violated Duffy's Fifth Amendment right to due process when it denied Duffy equal protection under the law by hiring a "substantially less qualified female applicant" because of her gender. *See* Compl. at 4, ¶ 11, *reprinted in* I J.A. at 6, Tab 2. Duffy sought a declaratory judgment that the Panel had acted unconstitutionally, an injunction requiring his appointment to the CUSPO position, unspecified monetary damages, and costs and attorney's fees. *Id.* at 5-6, ¶¶ A-D, *reprinted in* I J.A. at 7-8, Tab 2.

The Panel filed a motion to dismiss with the district court. Because the motion had been supported by affidavits and accompanying documents, the district court construed the motion as a motion for summary judgment. *See* Mem. Op. & Order (Aug. 5, 1996) at 1, *reprinted in* II J.A. at 158, Tab 18. The district court rejected several of the Panel's arguments, including the Panel's contention that Duffy was precluded from bringing a *Bivens* action because of the availability of administrative remedies, *see id.* at 11, *reprinted in* II J.A. at 168, Tab 18, and the Panel's claim of absolute immunity. *See id.* at 14, *reprinted in* II J.A. at 171, Tab 18. After conducting an analysis of qualified immunity, the district court granted summary judgment to the Panel. *Id.* at 21-22, *reprinted in* II J.A. at 178-79, Tab 18 ("because

Plaintiff has insufficient support for his claims, and because policy considerations mandate a 'firm application of the Federal Rules of Civil Procedure,' *Butz v. Economou,* 438 U.S. 478, 508 (1978), to avoid subjecting public officials to the expense and distraction of trial, the defendants' motion to dismiss, treated as a motion for summary judgment, will be granted" (footnote omitted)).

Prior to the district court's grant of summary judgment, Duffy's counsel had filed a Federal Rule of Civil Procedure 56(f)[4] affidavit and a Memorandum in Opposition to the Motion to Dismiss expressing the need for additional discovery. *See* Baker Aff. (June 17, 1996) at 2, ¶ 4, *reprinted in* II J.A. at 112, Tab 8 ("Until [Duffy] conducts discovery and specifically has the opportunity to depose each of the Defendants he is not in a position where he can reasonably make a presentation that the Plaintiff's [sic] explanations for their actions are a pretext for unlawful discrimination."); Mem. in Opp'n to the Mot. to Dismiss (June 20, 1996) at 28, Section VII ("[Duffy] further requests that since the affidavits of the Defendants do not address the prima facie claim of gender discrimination of the Plaintiff that [the Court] either deny the summary judgment aspect of the motion

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[4] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f).

or stay any considerations of that motion and allow the Plaintiff to undertake discovery."). The district court, however, concluded that additional discovery was unnecessary. *See* Mem. Op. & Order at 21, *reprinted in* II J.A. at 178, Tab 18 ("[T]he Court does not believe that allowing Plaintiff to conduct discovery would aid his case. The Court has before it affidavits from all the defendants and all the members of the screening panel. The affidavits support the defendants' position."). Duffy now appeals.

II.

We review the district court's grant of summary judgment de novo. *See Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997). We may affirm the district court's grant of summary judgment only if, examining the evidence in the light most favorable to Duffy, the record "demonstrates 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). While "summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case." *Helfter,* 115 F.3d at 615-16 (quotations and citations omitted).

Duffy's action against the Panel is premised on the Panel's alleged decision to employ a less-qualified female applicant, rather than Duffy, because of her gender. The Due Process Clause of the Fifth Amendment to the United States Constitution has been interpreted to forbid the federal government from discriminating on the basis of gender unless such discrimination is substantially related to the achievement of an important governmental

objective. *See Davis v. Passman*, 442 U.S. 228, 234-35 (1979). In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court recognized in the Constitution and the general federal question jurisdictional statute, 28 U.S.C. § 1331, an inherent cause of action for damages against federal actors for violations of federal constitutional rights. *See Bivens*, 403 U.S. at 396 ("it is well settled that where legal rights have been invaded, and a federal statue provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done" (quotations, citation, and alteration omitted)). Duffy's claim of employment discrimination is, accordingly, a cognizable *Bivens* action. *See Davis*, 442 U.S. at 244 (congressman's secretary could pursue *Bivens* action against employer when she was dismissed solely because of her gender).

A.

The Panel has asserted several affirmative defenses to support the district court's grant of summary judgment. First, the Panel asserts that it is eligible for absolute judicial immunity from Duffy's suit. We disagree.

"As a class, judges have long enjoyed a comparatively sweeping form of immunity . . . ." *Forrester v. White*, 484 U.S. 219, 225 (1988). This absolute immunity from suit allows judges to fulfill their duties without concern for their own fortunes, which helps to ensure that their duties will be performed impartially and completely. *See id.* at 223-24. Judicial immunity does not derive from the persona of the judge, however, but rather from the judicial acts performed by the judge. Accordingly, while judges enjoy absolute immunity when performing "paradigmatic judicial acts involved in resolving disputes be-

tween parties who have invoked the jurisdiction of a court," *id.* at 227, "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Id.* at 228.

In *Forrester,* the Supreme Court dealt with a nearly identical situation as the instant case. There, a state court judge fired a probation officer. The probation officer brought suit, alleging racial discrimination. The Supreme Court held that the judge's termination of an employee was an administrative act, *see id.* at 229, and that the judge was not eligible for absolute immunity. *Id.* at 230. *See also Bryant v. O'Connor,* 848 F.2d 1064, 1067 (10th Cir. 1988) (absolute immunity not available to federal judge sued for racial discrimination in termination of probation officer).

In the instant matter, the Panel seeks to distinguish *Forrester* because the "[a]ppointment of a chief probation officer now involves considerations beyond the mere administrative tasks of evaluating and promoting employees." Appellees' Br. at 15. While this is undoubtedly correct, we fail to see how these additional considerations can transform an administrative decision, albeit an extremely important administrative decision, into a judicial one. We conclude that the district court correctly held that the Panel is not eligible for absolute immunity in this matter.

B.

In allowing the plaintiff's cause of action to proceed in *Bivens*, the Supreme Court noted that "[t]he present case involves no special factors counseling hesitation in the

absence of affirmative action by Congress." 403 U.S. at 396. In the instant matter, the Panel contends that "special factors counseling hesitation" exist because Duffy Could have filed an administrative complaint regarding the alleged employment discrimination under the EEO Plan for the United States District Court for the Southern District of Iowa. *See* Appellees' Br. at 20. Because Duffy could have accessed the EEO Plan remedies, the Panel suggests that Duffy's suit be dismissed. *See, e.g., Carter v. Kurzejeski,* 706 F.2d 835, 839 n.5, 842-43 (8th Cir. 1983) (dismissing *Bivens* action because "the arbitral and administrative procedures recognized and created by the Civil Service Reform Act, which provide ultimately for some judicial review, are the *exclusive* means of redress from a discharge from federal employment based on anti-union animus, thus barring independent federal district court jurisdiction under other statutes altogether" (emphasis in original)). Respectfully, we must again disagree.

The administrative scheme relied on by the Panel was instituted at the direction of the Judicial Conference. *See* I J.A. at 46, Tab 5. In *Krueger v. Lyng,* 927 F.2d 1050 (8th Cir. 1991), we emphasized that:

> *Only Congress* has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action, without some real indication that Congress intended the administratively-created scheme to have that result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated—a delegation almost certainly in violation of the separation of powers doctrine.

Id. at 1055 (citations omitted) (emphasis added). In this case, the Panel has presented no support that Congress

intended to delegate to the Judicial Conference the authority to preempt a *Bivens* action in favor of administrative remedies. We accordingly conclude that Duffy is not forestalled from pursuing a *Bivens* action on this ground.

C.

Finally, the Panel argues that it is entitled to qualified immunity from Duffy's suit. Public "officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "This is an objective standard," *Swenson v. Trickey,* 995 F.2d 132, 133 (8th Cir. 1993), and its application to the circumstances of a particular case presents a questions of law. *Id.* We have held that

> [a] right is 'clearly established' for qualified immunity purposes if the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 133-34 (quotations, citations, and alterations omitted).

In *Davis*, filed in 1979, the Supreme Court made clear that federal employees have a Fifth Amendment right to be free of discrimination on the basis of gender. *See* 442 U.S. at 234-35. In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the Court considered a

claim of reverse discrimination on the basis of race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307. It was thus well established by 1979 both that gender discrimination was prohibited by the constitution and that discrimination against historically empowered groups was forbidden by the constitution. We believe that the synthesis of these two concepts was readily perceivable by 1993, the time of the Panel's alleged constitutional violation. We therefore agree with the district court that a reasonable person would have known, when the Panel made its CUSPO hiring decision, that a male federal employee had a clearly established constitutional right to be free of gender discrimination. *See* Mem. Op. & Order at 18, *reprinted in* II J.A. at 175, Tab 18.

The remaining question, however, is whether the Panel's conduct violated this well-established right. As the district court noted, "[i]t is at this point that the defense of qualified immunity begins to look like a ruling on the merits." *Id.* at 16 n.4, *reprinted in* II J.A. at 173, Tab 18. Accordingly, we address the merits of Duffy's *Bivens* action.[5]

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[5] In reaching the merits of Duffy's claim, the district court's analysis was somewhat enigmatic. *See* Mem. Op. & Order at 18-22, *reprinted in* II J.A. at 175-79, Tab 18. While "we recognize that our analysis differs from that of the district court," *Yowell v. Combs*, 89 F.3d 542, 544 n.4 (8th Cir. 1996), we may "affirm the district court on any grounds supported by the record." *Id.* (affirming district court's grant of summary judgment); *see also Tyus v. Schoemehl*, 93 F.3d 449, 453 n.6 (8th Cir. 1996) (holding that this Court "may affirm the district court's grant of summary judgment on any ground supported by [the] record" (quotations and citation omitted)), *cert. denied*, 117 S. Ct. 1427 (1997).

III.

Typically, employment discrimination cases are brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17. Recognizing that, by their nature, employment discrimination claims are often difficult to prove, the Supreme Court crafted a burden shifting analysis for evaluating the merits of Title VII claims in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Under this analysis:

> First, the plaintiff must demonstrate the ability to prove the four elements of a prima facie case. To make this showing, not a difficult or onerous burden, the record must demonstrate that plaintiff can prove: 1) that she is a member of a protected class; 2) that she applied and was qualified for a job for which the employer was seeking applicants; 3) that she was rejected; and 4) that after rejecting plaintiff the employer continued to seek applicants with plaintiff's qualifications. . . . Under Title VII she must show that the employer hired a man for the position. . . . The prima facie case, in the absence of an explanation from the employer, creates a rebuttable presumption of discriminations.
>
> In the second part of the *McDonnell Douglas* analysis the burden shifts to the defendant who must rebut the presumption of discrimination by producing evidence, that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. This is a burden of production not proof. The defendant need not persuade the court, it must simply provide evidence sufficient to sustain a judgment in its favor. In the third and final part of the analysis, the burden shifts back to plaintiff once the de-

> fendant has met its burden of production. Plaintiff must then establish the existence of facts which if proven at trial would permit a jury to conclude that the defendant's proffered reason is pretextual and that intentional discrimination was the true reason for the defendant's actions.

Krenik v. County of Le Sueur, 47 F.3d 953, 957-58 (8th Cir. 1995) (quotations and citation omitted). *See also Lang v. Star Herald,* 107 F.3d 1308, 1311 (8th Cir. 1997) ("Once the [defendant] advances a nondiscriminatory reason, [the plaintiff] must show, in this summary judgment proceeding, that she has sufficient admissible evidence from which a rational factfinder could find that the [defendant's] proffered nondiscriminatory reason was either untrue or not the real reason, and that intentional discrimination was the real reason." (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993); *Ryther v. KARE 11,* 108 F.3d 832, 838 n.5 (8th Cir.) (en banc), *cert. denied,* 117 S. Ct. 2410 (1997); *Ryther,* 108 F.3d at 848 n.13 (Part I.A. of concurring and dissenting opinion, in which eight active judges joined))), *petition for cert. filed,* (U.S. June 5, 1997) (No.96-9275).

In reverse discrimination cases, several courts have held that, to present a prima facie case, a plaintiff must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Murray v. Thistledown Racing Club, Inc.,* 770 F.2d 63, 67 (6th Cir. 1985) (quotations and citations omitted); *see also Bishopp v. District of Columbia,* 788 F.2d 781, 786 (D.C. Cir. 1986) ("A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups to give rise to an inference of discriminatory motivation. White males, who as a group

historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them." (quotations, citations, and alterations omitted)). However, "[j]ust because a reverse discrimination claimant cannot show the background circumstances necessary to trigger the *McDonnell Douglas* presumption does not inexorably mean that his employer has not intentionally discriminated against *him*. . . . An employee who is the victim of intentional discrimination in such circumstances, and who adduces sufficient evidence of that discrimination, should be permitted to proceed beyond the prima facie case state of litigation." *Notari v. Denver Water Dep't,* 971 F.2d 585, 590 (10th Cir. 1992) (emphasis in original).

While Duffy is statutorily exempt from bringing a claim under Title VII, *see* 42 U.S.C. § 2000e-16, Duffy nevertheless contends that we should apply the *McDonnell Douglas* analysis to his *Bivens* claim. We agree. While a Title VII analysis is not always identical to a constitutional analysis, *see, e.g., Johnson v. Transportation Agency,* 480 U.S. 616, 627 n.6 (1987) (rejecting argument that "the obligations of a public employer under Title VII must be identical to its obligations under the constitution"), we have applied the *McDonnell Douglas* analysis to a claim of employment discrimination brought under 42 U.S.C. § 1983 as a violation of the Fourteenth Amendment. *See Richmond v. Board of Regents of Univ. of Minn.,* 957 F.2d 595, 598 (8th Cir. 1992). "[A]n action under *Bivens* is almost identical to an action under section 1983, except that the former is maintained against federal officials while the latter is against state officials." *Sanchez v. United States,* 49 F.3d

1329, 1330 (8th Cir. 1995) (per curiam) (quotations and citations omitted); *see also Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987) ("Both *Bivens* and section 1983 actions are designed to provide redress for constitutional violations. Though the two actions are not precisely parallel, there is a general trend in the appellate courts to incorporate § 1983 law into *Bivens* suits." (quotations, citations, and footnote omitted)). Accordingly, we believe it proper to apply the *McDonnell Douglas* analysis to Duffy's *Bivens* claim.

We conclude that Duffy has made a prima facie case of employment discrimination. Duffy, a male, applied for and was qualified for the CUSPO position that was ultimately given to a female applicant. Duffy has alleged three "background circumstances [to] support the suspicion that the [Panel] is that unusual employer who discriminates against the majority." *Murray*, 770 F.2d at 67 (quotations and citations omitted). These background circumstances are: (1) that McPhillips was substantially less qualified than Duffy; (2) Chief Judge Wolle had mentioned an interest by someone in the Administrative Office in the recruitment of a female; and (3) that two members of the Panel had usually hired female law clerks.

In presenting a prima facie case, Duffy has created a presumption that the Panel discriminated against him on the basis of gender. To rebut this presumption, the Panel had the burden of presenting evidence that Duffy "was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Krenik*, 47 F.3d at 958 (quotations omitted). The Panel has met this burden. Each member of the Panel explained, in their affidavits, that McPhillips was selected on the basis of nondiscrimi-

natory criteria. *See* Wolle Aff. at 3-4, ¶ 8, *reprinted in* I J.A. at 19-20, Tab 5; Vietor Aff. at 2-3, ¶ 5, *reprinted in* I J.A. at 99-100, Tab 6; Longstaff Aff. at 3-4, ¶ 5, *reprinted in* II J.A. at 103-04, Tab 7. These criteria include McPhillips's experience, education, and demeanor during her interview, as well as the strong recommendations of jurists familiar with McPhillips's work.

Because the Panel successfully rebutted the presumption of discrimination created by Duffy's prima facie case, "the burden shifts back to [Duffy]" to "establish the existence of facts which if proven at trial would permit a jury to conclude that the defendant[s'] proffered reason is pretextual and that intentional discrimination was the true reason for the defendant[s'] actions." *Krenik*, 47 F.3d at 958. The only allegations Duffy has made are those that support his prima facie case: (1) McPhillips was substantially less qualified than Duffy; (2) Chief Judge Wolle had mentioned an interest by someone in the Administrative Office in the recruitment of a female; and (3) two members of the Panel had usually hired female law clerks. We address these allegations in turn.

In the usual course of business, an employer will naturally hire the most qualified candidate for a position. *See Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) ("A rational employer can be expected to promote the more qualified applicant over the less qualified, because it is in the employer's best interest to do so."). Evidence that an employer hired a less qualified candidate for a position can support a finding that the employer's nondiscriminatory reason for the hiring was pretextual. *Cf. id.* at 153-54 ("when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the

employer acted out of a discriminatory motive"). *See also Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 864 (8th Cir. 1997) ("Where, as here, the employer contends that the selected candidate was more qualified for the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is a reason to disbelieve the employer's proffered reason for its employment decision. . . . [A] comparison that reveals that the plaintiff was only similarly qualified as the selected candidate would not raise an inference of racial discrimination."). Identifying those strengths that constitute the best qualified applicant is, however, a role best left to employers; as we have often noted, "the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). This is true even when those making employment decisions are federal judges.

In this case, Duffy contends that he was more qualified than McPhillips for the CUSPO position because he had more experience than McPhillips in areas such as management training. *See* Appellant's Br. at 31-32. We disagree. In light of McPhillips's competing areas of expertise, it is not evidence of pretext that Duffy had more experience in certain areas than did McPhillips but was nevertheless not selected for the position. It is inevitable that two candidates with a combined forty years of experience as probation officers will have different strengths. We do not see how the Panel's preference for McPhillips's depth of experience in the area of presentence investigation over Duffy's breadth of experience in

the areas of pretrial and supervision can be interpreted as pretextual for gender discrimination. *See id.* (contrasting applicants' qualifications).

It is uncontested that McPhillips received glowing recommendations from Minnesota jurists, and Duffy does not challenge the Panel members' perceptions of McPhillips's interviewing skills. In comparing McPhillips's objective qualifications with Duffy's, it is apparent that McPhillips was not "substantially less qualified" than Duffy. McPhillips had two years more experience than Duffy as a United States Probation Officer. While Duffy had only a bachelor's degree and a master's degree, McPhillips had a bachelor's degree, a master's degree, and a law degree.[6] While Duffy only had experience in the Southern District of Iowa, McPhillips had experience in two larger judicial districts, the Administrative Office, and the United States Sentencing Commission. Under these nondiscriminatory criteria—which the Panel was free to rely on—McPhillips was the stronger candidate for the CUSPO position.

Nor do we believe that the Administrative Office's alleged interest in obtaining a diverse pool of applicants can support a finding of pretext. *See* Wolle Aff. at 1-2, ¶ 2, *reprinted in* I J.A. at 17-18, Tab 5 (recounting that the Administrative Office wished the Panel to "advertise

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[6] Duffy contends that "a law degree was not considered as relevant for the position in the vacancy announcement." Appellant's Br. at 35 n.13. We disagree. The Vacancy Announcement specified that, as part of his duties, a CUSPO "[r]eviews, analyzes, and interprets statutory, Judicial Conference, and Parol Commission requirements for administration of probation and parole services. . . ." I J.A. at 25, Tab 5. We believe that legal training would clearly be valuable to someone performing theses duties.

the [CUSPO] position in a publication of national circulation to reach all persons who might be interested so [the Panel] could have an open, nationwide, diverse pool of qualified applicants"); Ailts Aff. at 1-2, ¶ 3, *reprinted in* II J.A. at 143-44, Tab 14 (describing a statement by Chief Judge Wolle "about an interest in the appointment of a female" to what Ailts assumed was the CUSPO position); Duffy Aff. at 8, ¶ 20, *reprinted in* II J.A. at 124, Tab 10 (contending that "the Administrative Office was recommending an aggressive effort on the part of the COURT to recruit minorities and females as candidates for the Chief Probation Officer position which was becoming vacant").[7]

An employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination. *See Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1553-54 (M.D. Ala. 1995) ("affirmative recruitment is a neutral measure") (interpreting *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994), and *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994)). An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. *See id.* This not only allows

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[7] There is no indication in the record that the Panel actually took steps to specifically recruit female candidates. Indeed, in the Vacancy Announcement published in *News and Views*, there is no reference to gender. Instead, the Panel explicitly declares that "THE COURT IS AN EQUAL OPPORTUNITY EMPLOYER." I J.A. at 25, Tab 5. We will assume, however, that a jury could find that the indication of interest from the Administrative Office could have influenced the Panel to recruit female applicants for the CUSPO position.

employers to obtain the best possible employees, but it "is an excellent way to avoid lawsuits." *Id.* The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, "is not an appropriate objection," *id.*, and does not state a cognizable harm.[8]

All that is left to support Duffy's allegation of pretext is, therefore, Duffy's assertion that two of the Panel's members have hired more female law clerks than male law clerks. *See* Duffy Aff. at 11, ¶ 27, *reprinted in* II J.A. at 127, Tab 10 (alleging that of Chief Judge Wolle's eight law clerks, six have been female, and that of Judge Longstaff's nine law clerks, eight have been female). The district court disregarded this allegation, concluding that "the judges' law clerk hiring practices are irrelevant . . . ." Mem. Op. & Order at 21 n.5, *reprinted in* II J.A. at 178, Tab 18.

"Relevant evidence" is defined by Federal Rule of Evidence 401 to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Our review of the district court's determination of relevance is extremely deferential. *See Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996) ("The district court has broad discretion in ruling on the admissibility of proffered evidence, and we review the court's decision for an abuse of that discretion.").

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[8] It appears that Duffy himself would agree with this assessment of the benefits of inclusive recruitment. In his resume, Duffy contends that one of his "MAJOR ACHIEVEMENTS" is that he "[e]ncouraged hiring of women and minorities for Probation Officer positions." I J.A. at 28, Tab 5.

We do not believe that the district court abused its discretion in disregarding this allegation. The employment responsibilities—and working relationship with a judge—of a CUSPO differ dramatically from those of a judicial law clerk. *Compare* Vacancy Announcement, *reprinted in* I J.A. at 25, Tab 5 (detailing duties of CUSPO), *with Bishop v. Albertson's, Inc.*, 806 F. Supp. 897, 899-902 (E.D. Wash. 1992) (detailing duties of a judicial law clerk). Only if we were to assume that the Panel members had a generalized discriminatory animus against males—a rather extraordinary bigotry to be found in an all-male group of judges—could the judges' law clerk hiring practices be relevant to the Panel's decision to hire McPhillips rather than Duffy for the CUSPO position. That these defendants hired a few more female law clerks than male is too slender an evidentiary reed to support such an extraordinary finding.

Standing against this lack of evidence of pretext is a universal declaration by each Panel member that McPhillips was not hired on the basis of her gender. *See* Wolle Aff. at 3-4, ¶ 8, *reprinted in* I J.A. at 19-20, Tab 5; Vietor Aff. at 2-3, ¶ 5, *reprinted in* I J.A. at 99-100, Tab 6; Longstaff Aff. at 3-4, ¶ 5, *reprinted in* II J.A. at 103-04, Tab 7. In addition, none of the screening committee members have alleged that gender played any role in McPhillips's selection, and two affirmatively declared that it did not. *See* Zoss Aff. (June 25, 1996) at 6-7, ¶¶ 15-16, *reprinted in* II J.A. at 153-54, Tab 16 ("At the time the committee made its recommendation, I did not believe that either David Duffy or John Stites were as qualified for the position as Jane McPhillips. . . . From my knowledge of the selection process, the gender of Jane McPhillips and David Duffy played no part in the selection process for the chief probation officer for the

Southern District of Iowa."); Nickerson Aff. (June 28, 1996) at 2, ¶ 2, *reprinted in* II J.A. at 156, Tab 17 ("To my personal knowledge, the screening committee served as an objective appraiser of the qualifications of the applicants for the position. Gender of the applicants played no role in my consideration of the relative qualifications of each applicant. Likewise, it is my belief that the members of the committee held no predisposition with respect to the gender of the applicants who would ultimately be submitted to the court.").

In affirming a grant of summary judgment to a United States district judge in an employment discrimination suit brought by a terminated probation officer, the Tenth Circuit in *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988) explained that:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.
>
> These considerations take on added significance in the instant case since Bryant [the plaintiff] charged a federal judge and a judicial officer with misconduct. In *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 n.35 (1982), the Supreme Court reiterated its admonition in *Butz v. Economou*, 438 U.S. 478, 507 (1978), that "'insubstantial' suits against high public officials should not be allowed to proceed to trial. . . . Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." The same policy applies with at least

> equal force to an action against a member of the judiciary.

Id. at 1067-68 (quotations and citations omitted). We agree. Because the instant case presents no questions of material fact left in dispute, we conclude that the district court properly granted summary judgment to the Panel. *See* Fed. R. Civ. P. 56(c).

III. [sic]

Duffy contends that the district court erred in granting summary judgment immediately, and that Duffy should have had the opportunity to conduct discovery prior to the entry of summary judgment. We disagree.

"'The standard of review of the district court's refusal to compel discovery is one of gross abuse of discretion.'" *Wilson v. International Bus. Machs. Corp.*, 62 F.3d 237, 240 (8th Cir. 1995) (quoting *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir. 1995)). We have explained that "Rule 56 of the Federal Rules of Civil Procedure, which governs summary judgment, does not require trial courts to allow parties to conduct discovery before entering summary judgment." *United States v. Light*, 766 F.2d 394, 397 (8th Cir. 1985) (per curiam). Rather,

> [u]nder Rule 56(a), a motion for summary judgment can be filed *at any time* after twenty days from the commencement of the action or service of the motion on the other party. The party who is faced with a summary judgment motion before he has conducted discovery may, under Rule 56(f), request the court to postpone ruling on the motion until he conducts some discovery. However, . . . Rule 56(f) is not a shield that can be

> raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its projections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where a party fails to carry his burden under Rule 56(f), postponement of a ruling on the motion for summary judgment is unjustified.

Id. at 397-98 (quotations, citations, footnote and alterations omitted) (emphasis in original); *see also Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797-98 (8th Cir. 1996) (describing burden of party invoking Rule 56(f)).

In his Rule 56(f) affidavit, Duffy's attorney contends that "[u]ntil [Duffy] conducts discovery and specifically has the opportunity to depose each of the Defendants he is not in a position where he can reasonably make a presentation that the Plaintiff's [sic] explanations for their actions are a pretext for unlawful discrimination." Baker Aff. at 2, ¶ 4, *reprinted in* II J.A. at 112, Tab 8. The district court rejected this argument, stating that "the Court does not believe that allowing Plaintiff to conduct discovery would aid his case. The Court has before it affidavits from all the defendants and all the members of the screening panel. The affidavits support the defendants' position." Mem. Op. & Order at 21, *reprinted in* II J.A. at 178, Tab 18.

Duffy has made no supportable allegations of discrimination, and it is well settled that "Rule 56(f) does not condone a fishing expedition" where a plaintiff merely

hopes to uncover some possible evidence of a constitutional violation. *Gardner v. Howard,* 109 F.3d 427, 431 (8th Cir. 1997); *see also Bryant,* 848 F.2d at 1068 ("Appellant invites us to let him proceed with his case and depose almost the entire Kansas judiciary—proceedings that would be disruptive to the administration of justice, based solely on his bare assertions and in the face of strong evidence that he was dismissed for cause. We decline the invitation. We reject Bryant's demand for discovery as a last ditch effort made in the 'hope' that he then will be able to buttress his claims. We hold as we do particularly in light of the policy considerations where a federal judge and judicial officer are charged as defendants."). We conclude that the district court did not abuse its discretion in declining to compel discovery in this case.

For the foregoing reasons, we affirm the district court's grant of summary judgment to the defendants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Filed August 5, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID A. DUFFY,	)	4-96-CV-40184
	)	
Plaintiff,	)	
vs.	)	MEMORANDUM
	)	OPINION
	)	AND ORDER
CHARLES R. WOLLE,	)	
HAROLD D. VIETOR, and	)	
RONALD E. LONGSTAFF,	)	
	)	
Defendants.	)	

This matter is before the Court on Defendants' motion to dismiss (filing 5), Defendants' statement of material facts (filing 6), Defendants' memorandum in support of the motion to dismiss (filing 8), Plaintiff's memorandum in opposition to the motion (filing 15), Plaintiff's counsel's affidavit (filing 16), Plaintiff's statement of contested material facts (filing 17), and Defendants' reply to Plaintiff's resistance (filing 18). Upon due consideration of the pleadings, the briefs, the evidence, and the case law, the Court finds that the motion to dismiss, treated as a motion for summary judgment, should be granted.

I. BACKGROUND

David Duffy filed this lawsuit after being an unsuccessful candidate for the position of Chief United States Probation Officer ("CUSPO") for the Southern District of

Iowa. Mr. Duffy has served as a United States Probation Officer in the Southern District of Iowa since 1974, and has worked in a supervisory capacity since 1989.

In October 1993, Mr. Edwin Ailts, then Chief United States Probation Officer for the Southern District of Iowa, provided written notification to the United States District Court Judges Wolle, Vietor and Longstaff of his intention to retire on or about May 1, 1994. Pursuant to 18 U.S.C. Section 3602[1], the judges discussed the appropriate procedure for selecting Mr. Ailts' successor. After Mr. Ailts tendered his formal resignation on December 7, 1993, the judges prepared a vacancy announcement to advertise the position in *News and Views*, a publication of the Probation Division of the Administrative Office of the United States Courts which is circulated to every federal probation office in the country.

The judges also established a panel to review all applications for the position, choose three to seven of the best-qualified of those applicants, and submit those names to the judges for interviews and a final decision.

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[1] Section 3602 provides in pertinent part as follows:

> **(a) Appointment.** – A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. . . .
>
> . . .
>
> **(c) Chief probation officer.** – If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

The members of this screening panel were Mr. Ailts, Judge Longstaff, United States Attorney for the Southern District of Iowa Don Nickerson, and Federal Public Defender for the Southern District of Iowa Paul Zoss.

The screening panel received and reviewed 16 applications for the position. Panel members conducted further investigation into the merits of certain applicants, speaking with colleagues who were familiar with the applicants and their qualifications for the job. The panel members also decided that as a matter of courtesy the names of any applicants from the United States Probation Office for the Southern District of Iowa should be forwarded to the judges for interviews.

After conducting its review, the screening panel forwarded to the judges for further consideration the names of three individuals. Those persons were David Duffy, John Stites, and L. Jane McPhillips. Mr. Duffy and Mr. Stites were supervisors in the probation office for the Southern District of Iowa, and Ms. McPhillips was a supervising probation officer in the District of Minnesota. The panel did not rank the finalists, or recommend one over another. The screening panel also provided copies of all applications to Judges Wolle and Vietor for their own evaluation, as they were not members of the panel.

On March 10, 1994, the judges interviewed Mr. Duffy, Mr. Stites and Ms. McPhillips. After independently reviewing the application materials and recommendations for each of the three, the judges met late that same afternoon to make their decision. Each judge voted to hire Ms. McPhillips. On March 14, 1994, the judges appointed Ms. McPhillips as the Chief United States Probation Officer for the Southern District of Iowa, commencing on May 2, 1994.

On March 8, 1996, Mr. Duffy filed this lawsuit against the judges in their individual and official capacities, claiming that their appointment of an allegedly less-qualified female candidate to the position violated his Fifth Amendment right to equal protection. He seeks declaratory and injunctive relief, as well as damages to compensate him for the alleged violation.

The defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. The defendants also submitted affidavit evidence in support of their motion, requesting that in accordance with Fed. R. Civ. P. 12(b) the motion to dismiss be treated as a motion for summary judgment pursuant to Rule 56. The plaintiff, however, asks that consideration of the summary judgment aspect of the motion be delayed to allow him to conduct discovery. Because this matter can be resolved on the present record, Plaintiff's request is denied, and his opposition to the defendants' motion is overruled.

II. DISCUSSION

A. Alternate remedies

As a preliminary matter, the defendants argue that Plaintiff's action is precluded because he failed to pursue alternative "equally effective" remedies. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971).[2] In *Bivens*, the United States Supreme Court

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[2] Plaintiff clearly and correctly states this is not a Title VII action. Title VII provisions plainly exclude employees of the (continued...)

held that damages are available to individuals whose constitutional rights have been violated by federal officials. Two exceptions to this are (1) where Congress has provided an alternative remedy, 403 U.S. at 397, or (2) where there are "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396.

The Supreme Court subsequently expounded on the concepts of "alternative remedies" and "special factors" in *Bush v. Lucas* 462 U.S. 367 (1983), holding that when there exists "an elaborate remedial system [e.g. the Civil Service Reform Act] that has been constructed step by step, with careful attention to conflicting policy considerations, . . . a new judicial remedy for the constitutional violation at issue" should not be created. 462 U.S. at 388. A "special factor" which is sufficient to preclude a *Bivens* action includes the existence of a statutorily-created remedy, even if the remedy does not provide complete relief. *Bush*, 462 U.S. at 388; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

The Eighth Circuit Court of Appeals describes it thus:

> The result is a sort of presumption against judicial recognition of direct actions for violations

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[2] (...continued)

federal judicial branch whose positions are not in the competitive service. 42 U.S.C. Section 2000e-16(a).

Plaintiff, as a federal probation officer, is a judicial branch employee, but his position is considered "excepted service" rather than competitive service.

Moreover, this action is not precluded by the Federal Tort Claims Act as the exclusiveness of that remedy does not apply to constitutional violations committee by government officers or employees. 28 U.S.C. Section 2679(b)(2).

> of the Constitution by federal officials or employees. If Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them. Only if Congress's omission to recognize a constitutional tort claim was "inadvertent" will the courts be free to allow such a claim. . . . To some it may seem odd that congressional silence can, in effect, limit the right to be fully compensated for constitutional wrongs, but that is the message of *Chilicky*, and we are obliged to heed it.

McIntosh v. Turner 861 F.2d 524, 526 (8th Cir. 1988). *See also Maxey v. Kadrovach*, 890 F.2d 73, 75 (8th Cir. 1989), *cert. denied*, 495 U.S. 933 (1990).

In the present case, the defendants maintain that Plaintiff should have sought relief under the alternative remedies of the federal back pay statute, 5 U.S.C. Section 5596, or the Southern District of Iowa's Judiciary Equal Employment Opportunity Program before filing this lawsuit.

The Back Pay Act provides for back pay, interest, and attorney fees for employees who, on the basis of a timely appeal or administrative determination, are found to have been affected by "unjustified or unwarranted personnel action[s]" which resulted in the withdrawal or reduction of all or part of the employee's pay, allowances, or differentials.

The defendants' reliance on this statute as one under which Plaintiff could have pursued a remedy is misplaced, however. The Back Pay Act has been interpreted

as applying to failure-to-promote claims only where the improperly-denied promotion was noncompetitive and mandatory, rather than discretionary. *Woolf v. Bowles*, 57 F.3d 407, 411 (4th Cir. 1995) (citing *Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991), and *Edwards v. Lujan*, 40 F.3d 1152 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 417 (1995)). As the Court of Appeals for the Federal Circuit said, the Back Pay Act is "*not* designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were *required* by law." (emphasis in original). Clearly, the search for a chief probation officer was competitive and the ultimate choice was in the discretion of the judges. The Back Pay Act therefore does not apply.

The defendants next argue that Mr. Duffy should have sought relief through the equal employment opportunity plan implemented in the district in 1987.[3] The Judicial Conference of the United States directed each court to adopt a plan in conformance with the national policy of providing equal employment opportunities to all persons regardless of race, sex, color, national origin, religion, age, or disability. The program applies to all court personnel. An applicant or court employee who believes he or she has been discriminated against in any facet of personnel management, including recruitment, hiring, promotion, or advancement, has the right to initiate a complaint with the district's EEO coordinator. The co-

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[3] The following summary of the details of the district's equal employment plan is taken from Exhibit J to the Affidavit of Charles Wolle, attached to the defendant's Statement of Material Facts (filing 6).

ordinator is then responsible for investigating the matter as necessary, consulting with the parties, and preparing a report of his or her findings and recommendations.

If any of the parties objects to the coordinator's findings and recommendations, the party has the right to file a request for review with the chief judge or the chief judge's designee. The chief judge then may conduct such investigation as he or she deems appropriate, and hold a formal hearing if warranted. The chief judge then issues a final decision on the merits of the complaint.

Mr. Duffy and several of his colleagues submitted affidavits in this matter stating they were unaware of the EEO plan. *See* Affidavits of David A. Duffy, Karen Carter, Michelle C. DiBlasi, Leanne L. Moore, and John J. Spicer, attached to Plaintiff's Mem. in Opp. to the Mot. to Dismiss (filing 15). Their argument is unavailing. The plan is part of the public record, and all court employees are deemed to have notice of it.

More efficacious for the plaintiff, however, is the Eighth Circuit Court of Appeals' recognition that some administrative remedies may be "hollow" when an employee is required to appeal to the supervisor of those who committed the wrong about which he is complaining. *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991). In the *Krueger* case, the plaintiff discovered and reported "irregularities" in the operation of certain United States Department of Agriculture programs in the Missouri county where he was executive director of the Department's Agriculture Stabilization and Conservation Service ("ASCS"). His superiors at the state level discouraged him from pursuing the matter, and fired him after he bypassed the state ASCS committee to take his

concerns to the Office of the Inspector General ("OIG"). The OIG performed an audit which supported Krueger's allegations. Krueger appealed his termination through ASCS channels, but filed a *Bivens* action when the agency upheld his firing.

The Eighth Circuit discussed the application of the *Chilicky* standard to the *Bivens* actions, and analyzed the "inadvertence exception" in the context of federal employees such as Krueger who have no Congressionally designed remedial provisions available to them. The Court allowed Krueger to proceed with his *Bivens* suit because the "meager" administrative remedy otherwise available to him could not have been "the product of conscious Congressional design". *Krueger* at 1056, 1057.

Plaintiff here focuses on the "hollow and meager remedy" aspect of *Krueger*, and argues that requiring Mr. Duffy to have first pursued an EEO challenge within the Southern District of Iowa before filing this lawsuit would have been an exercise in futility, as he would have been appealing ultimately to one of the same people (or a designee thereof) who voted against him for the CUSPO position. Under the circumstances, this is a valid argument. Therefore, Mr. Duffy's case will not be dismissed for having failed to pursue administrative action before pursuing legal action.

B. Summary judgment standard

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law". Fed. R. Civ. P. 56(c). Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernible circumstances. *Vette Co. v. Aetna Casualty & Sur. Co.*, 612 F.2d 1076, 1977 (8th Cir. 1980). In passing upon a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion. *Id.* Even if the district court is convinced that the moving party is entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, in order that the case can be fully developed at trial. *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979).

Essentially the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). And, although under Federal Rule of Civil Procedure 56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

C. Immunity

In the present case, the parties disagree about whether the judges are protected by absolute or qualified immuni-

ty. The judges, of course, suggest that absolute judicial immunity protects them. Judges have long been entitled to absolute immunity from damage for their official judicial acts. Such immunity protects the finality of judgments, discourages inappropriate collateral attacks, and protects judicial independence by forfending frivolous and vexatious actions prosecuted by disgruntled litigants. *Forrester v. White*, 484 U.S. 219, 225 (1988).

This immunity is functional, attaching to the act rather than the actor and protecting truly judicial acts rather than acts that simply are performed by a judge. Thus, acts of a judicial character, performed within a judge's lawful jurisdiction, are covered, while acts of an administrative, legislative, or executive nature usually are not. *Id.* at 227.

The case law is clear that employment decisions made by judges are made in their administrative capacities and not in their judicial capacities. In *Forrester*, a state court judge who had statutory authority to appoint and dismiss probation officers was sued by a female officer whom he hired, promoted, demoted and discharged. The probation officer sued the judge for sexual discrimination. The judge claimed absolute immunity.

The United States Supreme Court found that, while the judge's duties of hiring and firing court employees were necessary to the court's operation, they were administrative acts as opposed to judicial acts. Judges, the Court held, are not distinguishable from other public officials who make personnel decisions without the protective cloak of absolute immunity. "To conclude that, because a judge acts within the scope of his authority, . . . employment decisions are brought within the court's

'jurisdiction,' or converted into 'judicial acts,' would lift form above substance." *Forrester*, 484 U.S. at 230. *See also Bryant v. O'Connor*, 848 F.2d 1064, 1067 (19th Cir. 1988).

Clearly, then, the defendants are not entitled to absolute immunity when appointing a new CUSPO. Absent case law to the contrary, not even the defendants' argument regarding the Court's reliance on the probation office's "active role" in Sentencing Guideline interpretation is sufficient to finesse this situation in to one which absolute immunity would apply.

On the other hand, however, government officials who are sued for damages for their performance of discretionary functions may raise the defense of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 815-818 (1982), the Supreme Court articulated the current doctrine of qualified immunity as follows: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Id.* at 818.

The most appropriate way to resolve motions involving the qualified immunity defense is to engage in a sequential analysis. This analysis may involve four inquiries.

First, one asks: from what the plaintiff claims, is the challenged conduct a violation of a constitutional or federal law as currently interpreted? Assuming a minimal level of specificity in the complaint, this analysis will focus only on the allegations of the complaint. If the conduct as alleged is not a violation of current law, then the defendant wins on the issue of qualified immunity.

If the conduct, as alleged, is a violation of federal law, then a second inquiry is required.

The second inquiry asks: if the challenged conduct is a violation of a constitutional or federal law as currently interpreted, was the law "clearly established" at the time of the challenged conduct? If the law was not "clearly established," then the defendant wins. If the law was "clearly established," then a third or fourth inquiry may be required.

At this juncture it is appropriate to pause. It is important to recognize that the first two inquiries focus on the complaint and assume the facts as alleged in the complaint are true. *If*, but only if, the defendant factually disputes (normally by way of affidavit in support of a motion for summary judgment) what the plaintiff alleges in the complaint is it proper to inquire into the facts. If the defendant challenges the factual accuracy of the complaint, then at least one, and perhaps two, additional inquiries may be necessary.

The third inquiry asks: Are the material facts *undisputed*, and, if so, do the material undisputed facts prove that: (1) defendant's conduct[4] did not violate established

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[4] It is at this point that the defense of qualified immunity begins to look like a ruling on the merits. Where, for example, a defendant puts at issue in support of a motion for summary judgment based on qualified immunity what he or she actually did, the court must be careful not to unfairly limit the defendant as to discovery. This is true even though one of the essential purposes of the qualified immunity doctrine is to protect defendants from defending lawsuits in the pretrial stages. *Harlow*, 457 U.S. at 815-17. When discovery is allowed, however, its scope should be narrowly tailored to the question of qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635,

(continued...)

law, or, (2) a reasonable person in the defendant's position would not have been aware that such conduct violated established law? Thus, the defendant wins on the defense of qualified immunity at this stage *if* (1) the facts are undisputed, *and*, (2) either: (a) the defendant's conduct did not violate established law, *or*, (b) a reasonable person in the defendant's position would not have been aware that such conduct violated established law.

The fourth inquiry asks: Assuming there are material facts in dispute, do the disputed material facts, *if proved at trial by the plaintiff*, nevertheless establish that (1) the defendant's conduct did not violate established law, or, (2) a reasonable person in the defendant's position would not have been aware that such conduct violated established law? Thus, a defendant wins the defense of qualified immunity *if* the material facts are disputed *only* by assuming that even if the plaintiff proves the disputed material facts at trial, either (1) the defendant's conduct did not violate established law, or, (2) a reasonable person in the defendant's position would not have been aware that such conduct violated established law.

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[4] (...continued)
646 n.6 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This having been said, a plaintiff will not be permitted to complain about the lack of general discovery as an excuse to defeat a motion for summary judgment based upon qualified immunity grounds. Rather, a plaintiff must, in order to avoid the conclusion that material facts are undisputed, point out *specifically* how a discovery limitation order precludes him or her from properly controverting the facts asserted by defendant regarding the defense of qualified immunity. *See* Fed.R. Civ. P. 56(f). If the limitation on discovery really does prohibit a plaintiff from controverting a material fact pertinent to the issue of qualified immunity, then one should assume the material fact is disputed and proceed to the fourth inquiry in the sequential analysis suggested in the text.

The first two inquires may be answered in the affirmative in the present case. Plaintiff alleges in his complaint that the CUSPO position was given to a "substantially less qualified" applicant because of that applicant's gender. Plaintiff claims this conduct violated his Fifth Amendment right to equal protection. At the time of the alleged discrimination in 1994, the law was clearly established. In *Davis v. Passman*, 442 U.S. 228 (1979), the United States Supreme Court held that the equal protection component of the Fifth Amendment's due process clause confers a federal constitutional right to be free from gender discrimination which does not meet the requirements of (1) serving important governmental objectives and (2) being substantially related to the achievement of those objectives. Therefore, Plaintiff has overcome the first two hurdles in the analysis.

From a review of the affidavits and statements of material facts which both sides have submitted for consideration on the present motion, it is clear the parties believe that factual disputes exist. At this point in the analysis, another reference to *Bryant v. O'Connor*, 848 F.2d 1064 (10th Cir. 1988), may be appropriate. While *Bryant* is a case from the Tenth Circuit and therefore is not binding authority here, this Court nonetheless finds its reasoning to be convincing, as well as particularly appropriate in this case.

Bryant was a federal probation officer who was discharged for poor performance. He sued the district's chief judge and CUSPO under the First and Fifth Amendments and 42 U.S.C. Section 1981, alleging that his firing was racially motivated. Summary judgment was granted for the defendants at the district court level on the basis of judicial immunity. The subsequent *Forrester*

decision on that issue was in Bryant's favor, but the Tenth Circuit found that sufficient grounds remained to affirm the summary judgment nonetheless.

In support of their motion for summary judgment, the *Bryant* defendants offered evidence of Bryant's mendacity and his flawed work, including serious inaccuracies and omissions in his presentence reports. The Tenth Circuit found this sufficient to support the defendants' claim that Bryant was terminated for legitimate, non-discriminatory reasons. Bryant countered with what the court characterized as "his own bare assertion" that defendant O'Connor has a reputation for racial prejudice. This, the court said, was inadequate to defeat the motion for summary judgment.

As in the present case, Bryant argued that an opportunity to complete discovery would allow him to respond more fully to the summary judgment motion. The court, however, discounted this argument, pointing out that (1) "insubstantial suits against high public officials should not be allowed to proceed to trial," *Bryant* at 1068 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 n. 35 (1982), and (2) mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion," *Bryant* at 1067 (quoting *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 107 (2nd Cir. 1981), and *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978)).

In the case currently before the Court, the defendants offer in support of their motion affidavits and supporting documentation on their procedure and their reasons for choosing Ms. McPhillips for the position. They explain their steps in publicizing the vacancy and reviewing,

investigating and interviewing applicants for the job. The evidence includes two letters commending Ms. McPhillips and speaking highly of her abilities (Baskfield letter of December 28, 1993, and MacLaughlin letter of June 11, 1992, both attached to Ex. H to the Wolle Affid. (filing 6)), as well as explanations by the judges of their independent determinations that Ms. McPhillips was the most qualified candidate. *See*, *e.g.*, Wolle Affid. par. 8, Vietor Affid. pars. 4 and 5, and Longstaff Affid. par. 5 (attached to Def.'s Statement of Material Facts (filing 6)).

In opposition, Mr. Duffy presents his own affidavit with his personal observations that he was best-qualified for the job. In addition, he provides his own analysis of the percentage of female law clerks hired by Judges Wolle and Longstaff as evidence that they are biased against men. All of this so-called evidence is speculative at best.[5]

Moreover, the Court does not believe that allowing Plaintiff to conduct discovery would aid his case. The Court has before it affidavits from all the defendants and all the members of the screening panel. The affidavits support the defendants' position. Even the affidavit of Mr. Ailts, which Plaintiff submitted, indicates only that (1) Mr. Ailts personal recommendation for his successor was Mr. Duffy, and (2) he had heard Judge Wolle comment in passing that some unnamed entity in Washing-

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[5] For instance, the judges' law clerk hiring practices are irrelevant, and Plaintiff's statements in pars. 22-26 of his affidavit (attached to Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss (filing 15)) regarding the defendants' compliments to him and their lack of comment on his merits relative to those of Ms. McPhillips do not exactly provide strong support for his argument.

ton, D.C., expressed interest in having a woman appointed to what Mr. Ailts assumed was the CUSPO position.[6] Affidavit of Edwin Ailts (attached to Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss (filing 15)).

Consequently, then, because Plaintiff has insufficient support for his claims, and because policy considerations mandate a "firm application of the Federal Rules of Civil Procedure," *Butz v. Economou*, 438 U.S. 478, 508 (1978), to avoid subjecting public officials to the expense and distraction of trial, the defendants' motion to dismiss, treated as a motion for summary judgment, will be granted.[7]

IT IS ORDERED Defendants' motion to dismiss (filing 5), reviewed as a motion for summary judgment, is hereby granted. Separate judgment will be entered.

DATED this 1st day of August, 1996.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE, Chief Judge
United States District Court
for the District of Nebraska

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[6] This statement shows only that the defendants were encouraged to conduct a sufficiently comprehensive search that women and minority candidates were represented in the applicant pool.

[7] The finding that Plaintiff is unable to show any *genuine* issue of material fact which would entitle him to proceed with this case negates the need for me to address whether declaratory and/or injunctive relief could be entered against these defendants.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3210SIDM

DAVID A. DUFFY,	)	
	)	
Appellant,	)	Order Denying Petition for
v.	)	Rehearing and Suggestion
	)	for Rehearing En Banc
	)	
CHARLES R. WOLLE, et al,	)	
	)	
Appellees.	)	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 29, 1997

Order entered at the Direction of the Court:

/s/ Michael E. Gars

Clerk, U.S. Court of Appeals, Eighth Circuit

[Filed June 20, 1996]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DES MOINES DIVISION

DAVID A. DUFFY,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 4-96-CV-10184
	)	
	)	
CHARLES R. WOLLE,	)	
HAROLD D. VIETOR and	)	
RONALD E. LONGSTAFF,	)	
	)	
Defendants.	)	

AFFIDAVIT OF DAVID A. DUFFY

STATE OF ILLINOIS
COUNTY OF SANGAMON—ss:

DAVID A. DUFFY, being duly sworn upon his oath, deposes and states as follows:

1. I am an adult resident of Des Moines, Iowa. Presently, I am employed as a Deputy Chief in the United States Probation Office for the Southern District of Iowa ["PROBATION OFFICE"]. My judicial pay scale grade is JSP-15. I have been employed continuously by the PROBATION OFFICE since April of 1974.

2. Prior to becoming employed in the PROBATION OFFICE I was a school psychologist. Before that I was in the United States Army for two years where I served as

a psychologist/sociologist specialist at the United States Army Medical Research Laboratory at Fort Knox, Kentucky.

3. I secured a baccalaureate degree in psychology from Drake University in 1965. Thereafter, I was awarded a masters degree in rehabilitation, psychological counseling and corrections at Southern Illinois University in Carbondale, Illinois. During the year 1971 and 1972 I was enrolled in a doctoral program in educational and school psychology at the University of Iowa.

4. In March of 1994 and for many years prior to that time the PROBATION OFFICE provided services to the United States District Court for the Southern District of Iowa ["COURT"] with respect to individuals who were convicted or charged with violations of the federal criminal laws. The functions of the PROBATION OFFICE in this respect were divided into three separate areas which are commonly referred to as pretrial, presentence and supervision.

5. The pretrial area provides services to the COURT with respect to evaluating and offering recommendations regarding whether an individual charged with a violation of the federal criminal laws should be released on bond and, if so, under what conditions. In that respect the pretrial area conducts an investigation and prepares a written recommendation to the COURT which addresses two considerations. The first consideration is whether the individual is a risk of flight. The second consideration is whether the individual presents a danger to the community.

6. The presentence area is involved with making recommendations concerning the sentence which should be

imposed upon an individual convicted of a federal crime. In this respect the PROBATION OFFICE conducts an investigation and prepares a written report to the COURT which covers the nature of the crime and the relevant history of the defendant in terms of his prior criminal record, employment, health, financial condition and family history. In November of 1987 the federal sentencing guidelines were enacted into law by Congress. I was trained in the guidelines and served as one of the three office experts in the PROBATION OFFICE with respect to the application of the sentencing guidelines. In 1993 and 1994 approximately 40% of the work of the PROBATION OFFICE was in the presentence area.

7. The supervision area is responsible for overseeing and monitoring individuals convicted of federal crimes following the imposition of a sentence with respect to individuals sentenced to probation and following incarceration of an individual who serves a prison term. This area assesses both the needs of individuals entrusted to it as well as their compliance with the terms of their supervision. In that connection it refers individuals entrusted to it to particular agencies or programs if a particular need is identified such as alcohol or drug abuse and works with such agencies to insure that the program goals are met.

8. During the period of my employment in the PROBATION OFFICE I have held both line, supervisory and administrative positions in each of the foregoing three areas. With respect to the pretrial area I served as a pretrial service officer for approximately three years. Between 1992 and 1994 I supervised the pretrial area of the PROBATION OFFICE with respect to the supervision of individuals who had been released on bond

pending trial. Additionally, in the absence of the Chief Probation Officer between 1989 and 1994 I supervised the preparation of bond reports which were submitted to the Magistrate Judge.

9. In the presentencing area I served as a presentence writer from 1974 until 1990. Between 1990 and 1994 in the absence of the Chief Probation Officer I was responsible for supervising the presentencing area for the PROBATION OFFICE.

10. With respect to the supervision area between 1974 and 1990 I had line responsibilities as a supervision officer. Between 1990 and 1994 I had the responsibility of supervising the supervision unit. In that respect I on average supervised five to six line officers.

11. Periodically during my employment with the PROBATION OFFICE I received a written performance appraisal prepared by the Chief Probation Officer. The appraisal form evaluates performance in four or five separate ratings. I was always given the highest rating available.

12. Between 1977 and 1990 in addition to my line responsibilities I was assigned various administrative responsibilities. In this respect I was: 1) the Pretrial Diversion Coordinator between 1977 and 1981; 2) the Training Coordinator between 1981 and 1987; 3) the Sentencing Guideline Expert from 1987 to 1992; and 4) the Drug Treatment Contract Specialist between 1987 and 1990.

13. In 1987 as one of my administrative tasks I developed the drug treatment program for the PROBATION OFFICE. In 1994 almost 70% of the prosecutions in the Southern District of Iowa were drug related. With

respect to those individuals prosecuted who came into the jurisdiction of the PROBATION OFFICE most became involved with the drug treatment program.

14. As a Sentencing Guideline Expert I served as a resource person for presentencing line officers. In that respect I would advise and counsel them concerning the application of the federal sentencing guidelines with respect to the specific cases on which they were working.

15. In 1993 and 1994 I was familiar with the manner in which the PROBATION OFFICE utilized the federal sentencing guidelines. The Chief Probation Officer played no greater role in the application and use of those guidelines in the work of the PROBATION OFFICE than did Probation Officers assigned to the presentence unit and the Sentencing Guidelines Expert. The decision concerning who would be designated as a Sentencing Guidelines Expert and who would be assigned duties as a Probation Officer in the presentencing unit was made by the Chief Probation Officer and not by the COURT.

16. In 1990 I was promoted to a supervisory salary grade position in the PROBATION OFFICE. At all times following my promotion I have held supervisory positions within the PROBATION OFFICE. However, I had supervisory responsibilities within the PROBATION OFFICE since 1989 even though my salary grade did not reflect that I held a supervisory position. Between 1989 and 1990 I was the highest grade level employee in the PROBATION OFFICE other than the Chief Probation Officer. From time to time during that period he would delegate to me supervisory tasks. Beginning in June of 1987 I became an approving officer and was authorized in the absence of the Chief Probation Officer to approve ex-

pense vouchers of staff in the PROBATION OFFICE. During the spring of 1989 and again in the fall or winter of that year the Chief Probation Officer was away from work approximately two weeks and one month respectively because of a serious health problem with his wife. During his absence that year I assumed the supervisory responsibilities associated with operation of the PROBATION OFFICE. In 1992 I was elevated to a JSP-14 level supervisor. In a small probation office such as the Southern District of Iowa a person holding a position of that level effectively serves as the deputy chief probation officer. Appended to this instrument as Exhibit A is a copy of a letter authored by the Chief Probation Officer in 1992 to the Human Resource Division of the administrative offices of the United States Courts in support of my elevation to JSP-14 position. Between approximately 1989 and 1994 when the Chief Probation Officer was absent from the PROBATION OFFICE for leaves I effectively assumed his duties. I attended both Executive meetings and indictment meetings with representatives of the United States Attorney's Office in the absence of the Chief Probation Officer. I participated in decisions concerning the hiring of probation officers and clerks. I attended in lieu of the Chief Probation Officer from time to time training seminars conducted for Chief Probation Officers which included the Pretrial Service Monograph Seminar and the Decentralized Budgeting Seminar. I attended the Enhanced Supervisor Monograph Seminar with the Chief Probation Officer and trained the presentence unit on that area upon completing the seminar. In order for me to attend the budgeting seminar which was held in the spring of 1993 in California the Chief Probation Officer was required to secure permission from Charles Wolle, the Chief Judge of the COURT.

17. Since becoming employed in the PROBATION OFFICE I have undergone various types of management training. In this respect between the years 1991 and 1994 I participated in the Leadership Development Program sponsored by the Administrative Office of the United States Courts. I successfully completed a principles and management course at Upper Iowa University in 1990. I have taken several supervision courses sponsored by the Federal Judicial Center. Between 1992 and 1994 I attended at my own expense three management workshops sponsored by Career Track as well as a management seminar sponsored by the National Seminar Group. In my application to become Chief Probation Officer I alluded to the forgoing experiences.

18. When I joined the PROBATION OFFICE in 1974 the Chief Probation Officer was Edwin G. Ailts. He continued to serve in that capacity until the spring of 1994 when he retired.

19. At some time during the first half of 1993 Mr. Ailts announced at a staff meeting his intention to retire from the PROBATION OFFICE in the spring of 1994. In either December of 1993 or January of 1994 I became aware through reading a current issue of "News and Views", the newsletter of the United States PROBATION OFFICE, that the Chief Probation Officer position was going to be filled. Appended to this instrument as Exhibit B is the vacancy announcement which appeared in that publication. When I became aware that applications were being received for that position I submitted my application for the Chief Probation Officer position. Appended to this instrument as Exhibit C is a copy of that application.

20. In October of 1993 I had a conversation with Mr. Ailts. During that conversation he informed me that Charles Wolle, the Chief Judge of the COURT, had recently returned from a conference in Washington with the Administrative Office of the United States COURTS. He informed Mr. Ailts that the Administrative Office was recommending an aggressive effort on the part of the COURT to recruit minorities and females as candidates for the Chief Probation Officer position which was becoming vacant. Thereafter, Mr. Ailts was selected by the COURT to serve on the selection committee appointed to assist in filling the Chief Probation Officer vacancy.

21. At about the time I submitted my application Mr. Ailts informed me that the selection committee would be composed of the United States Attorney, the Public Defender, Judge Ronald Longstaff and himself. In late February of 1994 Mr. Ailts informed me that in reviewing the applications for the Chief Probation Officer vacancy it appeared that the field of candidates was not particularly strong applicants.

22. On March 10, 1994 I was interviewed for the Chief Probation Officer position. The interview was conducted by Judges Wolle, Vietor and Longstaff and occurred in Judge Vietor's chambers. My interview lasted approximately 25 minutes. I became aware of the interview several days earlier upon my return from annual leave. During the interview I was asked a series of questions which was rotated among the three judges. During the interview Judge Vietor asked me what I would do if I did not get the position of Chief Probation Officer? I responded to that question by indicating that I enjoyed my work as well as the Des Moines community and if I did not receive the promotion I intended to continue with my

work in the PROBATION OFFICE. At the conclusion of my interview prior to leaving Judge Vietor's chambers he came over to me, shook my hand and complimented me on my interview. I have known Judge Vietor since his appointment to the federal bench in the late 1970's and I had never known him to extend praise when it was not deserved.

23. The following day John Stites and I were interviewing probation officer candidates in the courthouse. Mr. Stites was also interviewed the preceeding day for the position. While we were conducting the interviews Judge Wolle asked to speak with us. We spoke with him for approximately one minute. He indicated that "a woman supervisor from Minnesota" had been selected as Chief Probation Officer. He stated that we had both given good interviews and he understood our disappointment in not being awarded the position. He indicated that he was in the process of leaving the city and if we wished to discuss the selection further we should speak with Judge Longstaff.

24. I met with Judge Longstaff shortly after my conversation with Judge Wolle. The meeting occurred in Judge Longstaff's chambers and lasted approximately 50 minutes. During the conversation Judge Longstaff indicated that I had given a good interview and had not answered any question incorrectly. He further indicated that it had been a very difficult decision and the Judges just finally had to make a choice. Much of the conversation was devoted to me expressing to Judge Longstaff my concerns about not being selected for the position. He offered to me no explanation as to how Jane McPhillips was more qualified than I for the position or what lead

them to the conclusion that she be appointed to the position.

25. At no time during my interview was I asked any questions which related to the federal sentencing guidelines. During my meeting with Judge Longstaff he did not refer to either Ms. McPhillips background with the sentencing guidelines on her law degree as being factors which favored her appointment to the Chief Probation Officer position.

26. Several weeks after my meeting with Judge Longstaff I attended a probation revocation hearing before Judge Wolle. During a recess in the hearing he requested that I meet with him in his chambers. The meeting lasted 5 to 10 minutes in length. During the meeting he indicated he understood I was disappointed in not being selected as Chief Probation Officer. He said that he understood my disappointment. I indicated to him that it was my considered view that I was the best candidate for the position. He took no issue with that statement and offered no explanation as to why Ms. McPhillips had been selected for the position. He encouraged me to pursue what he called my "cutting edge ideas" for the operation, management and development of the PROBATION OFFICE which I had presented in my interview. He further indicated that if the new Chief Probation Officer interfered with my efforts in pursuing those ideas he wanted to be informed of such.

27. During my service as a probation officer I have become acquainted and aware of individuals who work in various positions in the COURT. In this respect I am aware of the individuals who have served as law clerks for each of the Judges of the COURT. Since he became

a District Judge in 1987 Judge Wolle has employed eight individuals to serve him as law clerks. Only two of those individuals were males. Since he became a District Judge in 1991 Judge Longstaff has employed nine different individuals to serve as his law clerks. Only one of those individuals was a male.

28. I have been employed by the COURT since 1974. At no time during my employment was I ever provided a copy of the Equal Employment Opportunity policies of the COURT or informed of any grievance rights I possessed in the event I felt I was the victim of discrimination or been made aware of the existence of any grievance rights prior to the initiation of the above lawsuit. As a matter of course during my employment benefit information relevant to my employment has been provided to me by the personnel officer of the PROBATION OFFICE. I did not become aware of any Equal Employment Opportunity guideline or grievance right until I reviewed the affidavits of the Defendants filed in the above captioned proceeding. At no time during my conversations with any of the Judges subsequent to my nonselection for the Chief Probation Officer position did any of them inform me of the existence of an equal employment policy or a grievance mechanism.

29. In April of 1994 I attended a retirement party held in honor of Edwin Ailts. During that party I read a number of letters that had been solicited for the occasion. The substance of which was to wish Mr. Ailts well in his retirement. One of the letters was from Judge Longstaff. In that letter Judge Longstaff referred to the PROBATION OFFICE as being the best probation office in the country.

30. This affidavit is based upon my personal knowledge and, if called upon, I could competently testify to the matters set forth above.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ David L. Duffy
DAVID L. DUFFY

Subscribed to and sworn before
me this 13th day of June, 1996.

/s/ Betty J. Miller
NOTARY PUBLIC

EXHIBIT A

July 8, 1992
REPLY TO DES MOINES

Ms. Ann Alston
Human Resource Division
Administrative Office of
the U.S. Courts
Washington, D.C. 20544

Re: DUFFY, David A.
SSN: 480 50 3307
Position No.: P8613179
RECLASSIFICATION OF A
SUPERVISOR POSITION TO JSP-14

Dear Ms. Alston:

The Southern District of Iowa is classified as a small district. The Supervision United States Probation Officer, David Duffy, presently a JSP-13, acts as a chief deputy would act in the larger districts in that he has office wide responsibilities.

You will note from our office organization chart that we are not below the 1:6 ratio.

The Supervising U.S. Probation Officer supervises the following staff:

Number Positions	Title	Target Grade
2	Senior U.S. Probation Officer	13
6	Probation Officers	12
8	**Total Subordinates**	

I am recommending that Supervising U.S. Probation Officer David Duffy position be reclassified to Grade 14.

Very truly yours,

/s/ Edwin G. Ailts
Edwin G. Ailts, Chief
U. S. Probation Officer

[Exhibit B omitted in printing; see App. 89-92 for vacancy announcement.]

EXHIBIT C

DAVID A. DUFFY
Supervising U.S. Probation Officer
Southern District of Iowa

POSITION APPLIED FOR: Chief United States Probation Officer, Southern District of Iowa

MANAGEMENT CAPABILITIES:

Administrative

Function as chief during CUSPO's absences

Initiate & coordinate intra and interagency planning and work

Conduct reviews of policies, procedures and programs

Integrate and coordinate activities of PO's

Assign and oversee daily work of PO's

Leadership

Assist CUSPO in selecting staff

Use significant educational preparation in psychology, educational psychology, school psychology, and counseling to assure practical application of motivation, learning and personality concepts of management approaches

Coordinate staff development and remediation of identified deficiencies

Co-facilitate with CUSPO continuous Enhanced Supervision training program

Promote ongoing training and professional improvement of PO's

Cognitive and Innovative

Develop and implement action-oriented programs and procedures

Integrate concept of least intrusive case supervision and crisis intervention

Create and initiate new strategies of case work, management and supervision

Analyze procedures and policies and develop approaches which are pragmatic, effective and cost-efficient

Personal Adaptability

Willfully assume roles CUSPO delineates

Tolerate stress well - remain calm and focused in crises and organizational change situations

Adapt readily to program changes which further organizational goals

Communication and interpersonal

Consistently demonstrate strong ability to use listening and patience in working with individuals with diverse needs and varying educational and cultural backgrounds

Present intra-agency seminars and workshops

MAJOR ACHIEVEMENTS:

Occupied progressively more responsible key leadership positions in the District including: Pretrial Di-

version Coordinator, Training Coordinator, WITSEC/ Special Offender Specialist, Guideline Expert, Drug Aftercare Specialist, Supervisor (JSP 13), Supervisor (JSP 14).

Performed regularly all duties of the CUSPO in his absence, including assignment of presentence reports, review of presentence and bond reports, attendance at meetings (Courthouse Administrative, Automation and Drug Task Force Indictment/Arrest), and acting as Approving Official.

Oversaw preparation of sensitive presentence report of former CUSPO of our district. Also, oversaw his supervision and authored high profile presentence reports for the district.

Assisted CUSPO in selection and background investigation of new POs and in selection of new clerks. Encouraged hiring of women and minorities for Probation Officer positions. Recommended assignment of additional duties to woman officer (mental health specialist designate) who was not senior in seniority but most qualified.

Participated in AO Budget Decentralized Workshop (February-March 1993).

Attended by invitation Judicial Center's Seminar on Enhanced Supervision (December 1991). Presented overview of supervision model to presentence and supervision officer staff. Developed, wrote and implemented policy for the Enhanced Supervision Model with supervision staff.

Accelerated development of supervision competency in line officers for the Enhanced Supervision Model by implementing a "team" approach.

Developed the following action-oriented procedures: The least intrusive form of case supervision; immediate response to drug positive; appropriate and comprehensive crisis intervention; and exhaustion of all supervision options (consistent with public safety) prior to revocation request.

Attended (November 1993) Judicial Center's Seminar on Pretrial Service Supervision Monograph and am involved in District's implementation.

Aided (1992) the U.S. Attorney's Office in formulating their current Pretrial Diversion Agreement.

Worked with Assistant United States Attorneys and supervision probation officers in streamlining violation reports and hearings for Court. Promoted sharing of information with defense counsel and encouraged stipulation and waiver of hearings as time-saving procedures.

Developed district's comprehensive drug treatment program.

Reviewed drug specialist's contract audits and drug contract invoices, made program improvements, recommended and troubleshot drug contracting problems. Reviewed electronic monitoring specialist's case supervision documents and invoices.

Developed a "weighted" case assignment supervision system to equalize workload among supervision officers.

Developed new forms and report formats for documents submitted to the Court or Parole Commission.

Formulated orientation program for new supervision officers stressing a pragmatic "hands on" learning approach.

Received Excellent Employee ratings since inception to Federal Probation Service (1974) and received two Quality Increase Awards for continued high quality performance.

WORK HISTORY:

SUSPO (JSP 14) 1992 - present

Act as Chief in Chief's absence and am responsible for quality control of drug aftercare and electronic monitoring specialist programs.

SUSPO (JSP 13) 1990 - 1992

Responsible for acting as Chief in Chief's absence and providing quality control for drug aftercare program.

Drug Treatment Specialist 1987 - 1990

Guideline Expert 1987 - 1992

Training Coordinator 1981 - 1987

Pretrial Diversion Coordinator 1977 - 1981

Entered Probation Service as probation officer 1974

Other experience includes work as a school psychologist, psychological-social specialist (service-connected duty at the Army Medical Research Lab) and three month internship (Master's program requirement) at Marion Federal Penitentiary.

PROFESSIONAL IMPROVEMENT:

Federal Judicial Center Leadership Development participant

Paper on Total Quality Management (submitted and accepted)

Paper demonstrating leadership's impact on probation and pretrial services (submitted and accepted)

Project creating "hands on" orientation program for new officers involved in supervision in the district (submitted and accepted)

Two week temporary duty assignment with Robert DeMaulenaere and J.C. Brenton, President and Past President of Brenton Banks of Iowa (to be completed no later than May of 1994)

Applied Supervisor's correspondence course - Federal Judicial Center (FJC) Sponsored

Seminar for new supervisors - FJC

Management Principles Course - three semester hours at local university

Total Quality Management Workshop (Management model touted by FJC) - Career Track

Self-Directed Work Teams Workshop - Career Track

One-Minute Manager Seminar - Emphasis: Matching leadership style to developmental state of worker - Career Track

Conflict and Anger Management Workshop - National Seminar Group

Training Coordinator and Advanced Training Coordinator Seminars - FJC

Reporting Writing Course - FJC

Sentencing Guideline Workshop - U.S. Sentencing Commission

Drug Contracting Workshop - FJC

WITSEC and Special Offender Workshop - FJC

EDUCATION:

1971 - 1972	University of Iowa
	Participation in Ed/Psych Doctoral Program
	Emphasis: Motivation, Learning, Learning and Behavior Disorders
1965 - 1967	Southern Illinois University
	Master of Science
	Emphasis: Rehabilitation, Psychological Counseling, and Corrections
1965	Drake University
	Bachelor of Arts
	Major: Psychology

[Filed June 20, 1996]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DES MOINES DIVISION

DAVID A. DUFFY,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 4-96-CV-10184
	)	
	)	
CHARLES R. WOLLE,	)	
HAROLD D. VIETOR and	)	
RONALD E. LONGSTAFF,	)	
	)	
Defendants.	)	

AFFIDAVIT MADE PURSUANT TO RULE 56(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

STATE OF ILLINOIS
COUNTY OF SANGAMON—ss:

JAMES P. BAKER, being duly sworn upon his oath, deposes and states as follows:

1. I serve as the primary counsel for the Plaintiff, DAVID DUFFY, in the above proceeding. In the above case the Plaintiff maintains his case under the Equal Protection clause of the Fifth Amendment of the United States Constitution and contends he was denied the equal protections of the law when he was passed over for promotion as Chief Probation Officer for the United States District Court for the Southern District of Iowa.

In this respect he contends that the Defendants' decision in selecting a successful applicant was based upon gender related considerations.

2. In their initial response to the complaint the Defendants have requested dismissal of the Plaintiff's claims under both Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure. With respect to the summary judgment aspects of their claim the Defendants apparently contend that the Plaintiff cannot demonstrate a prima facie claim of gender discrimination. Each of the Defendants has filed an affidavit in support of that motion.

3. The affidavits of the Defendants do not appear to address whether the Plaintiff can establish a prima facie claim of gender discrimination. Rather, each speaks to the reasons for the decision.

4. The Plaintiff has filed in response to the motion of the Defendants affidavits which support his position that he can establish a prima facie claim of gender discrimination in the instant case. Until he conducts discovery and specifically has the opportunity to depose each of the Defendants he is not in a position where he can reasonably make a presentation that the Plaintiff's explanations for their actions are a pretext for unlawful discrimination. It is unclear from the arguments addressed in their brief whether the Defendants' contentions in their affidavits concerning the factual aspects of the Plaintiff's claim of gender discrimination are limited to his capability of stating a prima facie claim or whether they expect him to attack the legitimacy of the Defendants' explanations for their actions. In the event it is the latter the Plaintiff, DAVID DUFFY, requests reason-

able opportunity to complete discovery before this Court rules on the aspects of the Defendants' motion for summary judgment which turns upon the reasons they state motivated their selection decision.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ James P. Baker
JAMES P. BAKER

Subscribed to and sworn before
me this 17th day of June, 1996.

/s/ Kathleen Y. Hastings
NOTARY PUBLIC

[Certificate of Service omitted in printing.]

[Filed June 20, 1996]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DES MOINES DIVISION

DAVID A. DUFFY,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 4-96-CV-10184
	)	
	)	
CHARLES R. WOLLE,	)	
HAROLD D. VIETOR and	)	
RONALD E. LONGSTAFF,	)	
	)	
Defendants.	)	

AFFIDAVIT OF EDWIN AILTS

STATE OF IOWA
COUNTY OF DALLAS—ss:

EDWIN AILTS, being duly sworn upon his oath, deposes and states as follows:

1. I am an adult resident of Adel, Iowa. Until the spring of 1994 I had for many years been employed as the Chief Probation Officer of the United States Probation Office ["PROBATION OFFICE"] for the Southern District of Iowa.

2. In the fall of 1993 I informed Judge Charles Wolle, Judge Harold Vietor and Judge Ronald Longstaff of my tentative intention to retire as the Chief Probation Officer of the PROBATION OFFICE some time in the

spring of 1994. At some point thereafter I tendered to them a more formal announcement of my decision to retire.

3. In my capacity as Chief Probation Officer I would from time to time engage in social conversations with each of the Judges. At some time following the time I informed the Judges of my intention to retire I had a passing conversation with Judge Charles Wolle. At that time he had recently returned from Washington, D.C. He made a comment that while in Washington he had received information about an interest in the appointment of a female. At this time I cannot recall the specific entity that he indicated expressed that interest to him. I assumed at that time that he was referring to the Chief Probation Officer position which would be vacated upon my retirement since I had only recently indicated my intention to retire and I was unaware of any other vacant positions. This was a brief conversation with Judge Wolle and the comment was made by him in passing.

4. I served on the review committee which was involved in selecting the Chief Probation Officer. The primary function of the review committee was to narrow from among the applications received for the position the candidates who would be interviewed by the Judges of the United State District Court for the Southern District of Iowa. In selecting finalists for interviews I understood that each individual who was a current employee of the PROBATION OFFICE would be entitled to an interview. The two individuals from the PROBATION OFFICE who had applied for the position were David Duffy and John Stites.

5. At some time after candidates were selected for an interview, but prior to the time an announcement was made concerning the applicant who was awarded the position I was asked by Judge Ronald Longstaff who I would recommend to fill the position. I informed him that my recommendation was that it be awarded to David Duffy.

6. This affidavit is based upon my personal knowledge and, if called upon, I could testify competently to the matters set forth above.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Edwin Ailts
EDWIN AILTS

Subscribed to and sworn before
me this 14th day of June, 1996.

/s/ Donna M. Hemphill
NOTARY PUBLIC

[Filed May 7, 1996]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID A. DUFFY,	*	
	*	
Plaintiff,	*	Civil No. 4-96-10184
v.	*	
	*	
	*	
	*	
CHARLES R. WOLLE,	*	AFFIDAVIT OF HAROLD D.
HAROLD D. VIETOR and	*	VIETOR, JUDGE OF THE
RONALD E. LONGSTAFF,	*	UNITED STATES DISTRICT
	*	COURT FOR THE SOUTHERN
Defendants.	*	DISTRICT OF IOWA

STATE OF IOWA
COUNTY OF POLK—ss:

HAROLD D. VIETOR, being first duly sworn, hereby deposes and states as follows:

(1) I have served as Judge of the United States District Court for the Southern District of Iowa since 1979. I served as Chief Judge from 1985-92.

(2) As a Judge of the United States District Court for the Southern District of Iowa, and pursuant to 18 U.S.C. Section 3602, I participated in the selection and appointment of a Chief Probation Officer to succeed Edwin Ailts, who retired effective May 1, 1994.

(3) Pursuant to the court's interest in obtaining a diverse pool of the best qualified applicants available, the vacancy in the Chief Probation Officer position was an-

nounced throughout the United States Probation Office system through *News and Views*, a publication of the Probation Division of the Administrative Office of the United States Courts. Upon information and belief, 16 persons submitted applications. A screening panel comprised of Judge Ronald E. Longstaff, U.S. Attorney Don Nickerson, U.S. Public Defender Paul Zoss, and Chief Probation Officer Edwin Ailts was designated by Chief Judge Wolle, Judge Longstaff and me to review the applications and references and to submit a list of application finalists to us for further consideration and interviews. Three finalists were submitted: (1) David Duffy; (2) John Stites; and (3) L. Jane McPhillips. These three finalists were interviewed by Chief Judge Wolle, Judge Longstaff and me on March 10, 1994, in my chambers between 9:00 a.m. and 11:00 a.m.

(4) I reviewed the applications and materials submitted by the three finalists. Because David Duffy and John Stites had served as probation officers and supervisors in the Southern District of Iowa for several years, I knew them personally and was familiar with their work. I did not know L. Jane McPhillips, who was a probation officer in the District of Minnesota. I spoke personally with Judge James Rosenbaum and Senior Judge Harry McLaughlin of the United States District Court for the District of Minnesota and Dan Scott, the U.S. Public Defender for the District of Minnesota. All three spoke very well of Ms. McPhillips' abilities and unequivocally and highly recommended her for the position of Chief Probation Officer. I reported to Chief Judge Wolle and Judge Longstaff on my conversations with Judge Rosenbaum, Senior Judge MacLaughlin and Mr. Scott, and they reported that Minnesota federal judges they con-

tacted also highly recommended Ms. McPhillips. I believe that one of us reported that the United States Attorney or an Assistant United States Attorney in the District of Minnesota also highly recommended Ms. McPhillips.

(5) At approximately 4:30 p.m. on March 10, 1994, Chief Judge Wolle, Judge Longstaff and I met to deliberate. I independently concluded that Ms. McPhillips was the best qualified candidate for the position. I was impressed with Ms. McPhillips' experience, which included significant supervisory responsibility in the District of Minnesota. I was also impressed with Ms. McPhillips' academic accomplishments which included going to law school and obtaining a juris doctor degree while she was serving as a probation officer in Minnesota. Ms. McPhillips' attributes also included extensive legal and practical experience with the Federal Sentencing Guidelines. One or more of the Minnesota judges I spoke with also commented on her excellent interpersonal skills with staff, and I considered that a good attribute. In reaching my conclusion I did not in any way consider the gender of Ms. McPhillips or the gender of Mr. Duffy or Mr. Stites. Gender of the three was not mentioned in discussions among Chief Judge Wolle, Judge Longstaff and myself. I was well satisfied that Ms. McPhillips was the best qualified person from the list of applicant finalists submitted by the screening panel. Only when we voted, did I learn that Chief Judge Wolle and Judge Longstaff shared my opinion that Ms. McPhillips was the best qualified applicant to succeed Mr. Ailts as the Chief Probation Officer of the United States District Court for the Southern District of Iowa. All three of us voted for her—Judge Longstaff first, I second, and Chief Judge Wolle third.

Further your affiant saith naught save that this affidavit is made in support of the defendants' motion to dismiss.

/s/ Harold D. Vietor
HAROLD D. VIETOR

Subscribed to and sworn to before me on
this 26th day of April, 1996.

/s/ James R. Rosenbaum
James R. Rosenbaum, Clerk
United States District Court
Southern District of Iowa

[Filed May 7, 1996]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID A. DUFFY,	*	
	*	
Plaintiff,	*	Civil No. 4-96-10184
v.	*	
	*	
	*	
CHARLES R. WOLLE,	*	AFFIDAVIT OF RONALD E.
HAROLD D. VIETOR, and	*	LONGSTAFF, JUDGE OF THE
RONALD E. LONGSTAFF,	*	UNITED STATES DISTRICT
	*	COURT FOR THE SOUTHERN
Defendants.	*	DISTRICT OF IOWA

STATE OF IOWA
COUNTY OF POLK—ss:

RONALD E. LONGSTAFF, being first duly sworn, hereby deposes and states as follows:

1. I joined the United States District Court for the Southern District of Iowa in 1965 as a law clerk to the Honorable Roy L. Stephenson in 1965; in 1968 I became both the Clerk of the Court and the United States Commissioner for the District. The latter position was changed to a United States Magistrate position in 1970. I then became the District's first full-time Magistrate Judge in 1976. I then became a United States District Court judge in 1991.

2. I serve as liaison between the court and the Probation Office for the United States District Court for the Southern District of Iowa. After Chief Probation Officer Edwin Ailts submitted notification of his intent to resign,

Chief Judge Wolle, Judge Vietor, and I decided to publicize the vacancy throughout the United States in an effort to obtain a diverse, qualified pool of applicants for the position. I became aware of the bi-weekly publication of the Probation Division of the Administrative Office of the United States Courts, *News and Views*. This publication, which is sent to every federal probation office, routinely carries vacancy announcements. Consistent with the court's interest in obtaining a diverse pool of well-qualified applicants, the court decided to advertise the Chief Probation Officer vacancy in *News and Views*. A true and correct copy of my memo of October 19, 1993 to Chief Judge Wolle and Judge Vietor regarding publication of the vacancy announcement in *News and Views* is attached hereto as Exhibit A.

3. Following Mr. Ailts' formal resignation on December 7, 1993, I arranged for publication of the vacancy notice for the position of Chief Probation Officer in *News and Views*. A true and correct copy of my memo confirming the publication as well as the vacancy announcement are attached hereto as Exhibits B and C.

4. At Chief Judge Wolle's request, I served as chairman of a panel to screen applicants for the position of Chief Probation Officer. Don Nickerson, United States Attorney for the Southern District of Iowa, Paul Zoss, Federal Public Defender for the Southern District of Iowa, and Edwin Ailts also served on the panel. The panel was charged with the responsibility of reviewing all applications and, where indicated, to conduct further investigation by way of background investigation with the probation offices in which the applicants worked as well as with other governmental agencies. The ultimate objective of the screening panel was to submit to the

court a list of the best qualified applicants as determined by the screening process. The members of the screening panel agreed that any applicants from the Probation Office for the Southern District of Iowa would be included in the list of applicants submitted to the court out of deference to the local Probation Office and in the interests of promoting harmony between the court and the local Probation office. The screening panel reviewed 16 applications. The screening panel recommended three individuals for further consideration and interview by the court: (1) David Duffy; (2) John Stites; and (3) L. Jane McPhillips. Mr. Duffy and Mr. Stites were both supervisors already in the local Probation Office. The screening panel made no further recommendation to the court with respect to the relative qualifications/merit of the three finalist applicants. The screening panel did not rate or prioritize the finalist applicants in any respect. Copies of all applications were forwarded to Judge Wolle and Judge Vietor. A true and correct copy of my correspondence of March 3, 1994 summarizing the screening panel's recommendation is attached hereto as Exhibit D.

5. On March 10, 1994, Chief Judge Wolle, Judge Vietor and I interviewed David Duffy, John Stites and L. Jane McPhillips. Following the interviews, we met to consider the application materials, references and interviews. During our deliberations, I was asked to state my views first. It was my opinion that Ms. McPHillips was the best qualified person of the three finalist applicants to assume the responsibilities of Chief Probation Officer. In coming to this conclusion, I was influenced not only by Ms. McPhillip's strong academic background and work experience but also by the recommendations which I had received during phone conversations from Chief Judge

Magnuson and Judge Rosenbaum of the District of Minnesota. Both judges were highly complimentary in their praise and recommendation of Ms. McPhillips. I also had a phone conversation with Magistrate Judge Earl Cudd of the District of Minnesota who provided Ms. McPhillips with a strong recommendation. These phone conversations took place prior to March 10, 1994. Thereafter, Judge Wolle and Judge Vietor also expressed their independent judgments that Ms. McPhillips was the best qualified applicant for the position. Ms. McPhillips' gender played no role whatsoever in the court's deliberations.

Further, your affiant saith naught save that this affidavit is made in support of the defendants' motion to dismiss.

/s/ Ronald E. Longstaff
RONALD E. LONGSTAFF, Judge
U.S. District Court

Subscribed to and sworn to before me on
this 1st day of May, 1996.

/s/ Diane F. Duncan
NOTARY PUBLIC

[Exhibits A-D omitted in printing.]

[Filed May 7, 1996]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID A. DUFFY,	*	
	*	
Plaintiff,	*	Civil No. 4-96-10184
v.	*	
	*	
	*	
CHARLES R. WOLLE,	*	AFFIDAVIT OF CHARLES R.
HAROLD D. VIETOR, and	*	WOLLE, CHIEF JUDGE,
RONALD E. LONGSTAFF,	*	UNITED STATES DISTRICT
	*	COURT FOR THE SOUTHERN
Defendants.	*	DISTRICT OF IOWA

STATE OF IOWA
COUNTY OF POLK—ss:

CHARLES R. WOLLE, being first duly sworn, hereby deposes and states as follows:

1. I have served as a judge of the United States District Court for the Southern District of Iowa since August of 1987; in May of 1992, I commenced serving as Chief District Judge of the District and still serve as Chief Judge.

2. On September 30 and October 1, 1993, I attended an orientation for new chief judges presented by the Administrative Office of the United States Courts in Washington, D.C. I was informed that when we needed to select a replacement for Edwin Ailts, our chief probation officer, we should advertise the position in a publication of national circulation to reach all persons who

might be interested so we could have an open, nationwide, diverse pool of qualified applicants.

3. On October 19, 1993, Edwin Ailts submitted written confirmation of his intention to resign on or about May 1, 1994. I attach as Exhibit A copy of that notification. Upon receipt of Ailts' notice, I conferred with Judges Harold D. Vietor and Ronald E. Longstaff to decide how we would select his replacement. We knew the final choice would be made by the three of us pursuant to 18 U.S.C. Section 3602. We decided to establish a screening panel comprised of Judge Longstaff, U.S. Public Defender Paul Zoss, U.S. Attorney Don Nickerson, and Edwin Ailts to review all applications and then submit to us the names of three to seven applicants whom we could interview in person as best qualified for the position of Chief Probation Officer. We also decided to defer publication of the vacancy notice until Ailts had tendered his formal resignation. I attach as Exhibit B a true copy of my letter to Edwin Ailts dated October 20, 1993, explaining the applicant screening process.

4. On December 7, 1993, Edwin Ailts tendered his formal notice of resignation effective April 29, 1994. I attach as Exhibit C a copy of that notice.

5. We then prepared a vacancy announcement and submitted it for publication in *News and Views*, a biweekly publication of the Probation Division of the Administrative Office of the United States Courts, advertising the position of Chief Probation Officer for the Southern District of Iowa. I believe the Administrative Office in December of 1993 circulated this publication nationwide to all probation officers. I attach as Exhibits D and E, respectively, copies of Judge Longstaff's

memorandum of December 13, 1993, regarding submission of the vacancy announcement to the Administrative Office of the United States Courts and the vacancy announcement itself.

6. The screening panel received 16 applications for the vacancy and reviewed the applicants' qualifications. The screening panel submitted to the district judges the names of three applications for the Chief Probation Officer vacancy: (1) David Duffy; (2) John Stites; and (3) L. Jane McPhillips. I attach as Exhibits F, G and H, respectively, copies of the applications of Duffy, Stites, and McPHillips. Mr. Duffy and Mr. Stites were both supervisors in the probation office for the Southern District of Iowa.

7. On March 10, 1994, we three district judges interviewed individually each of the three applicants recommended by the screening panel. We then voted and unanimously selected L. Jane McPhillips to serve as the Chief Probation Officer of the United States District Court for the Southern District of Iowa commencing on May 2, 1994.

8. At no time during the selection process did gender play any role in our consideration of the applicants. I voted to select McPhillips because she was the most qualified person by reason of her experience, her education, her demeanor during the interview, the letters of reference received with her resume, and the uniformly very complimentary comments of the Minnesota district judges and court officers we phoned.

9. On March 14, 1994, I signed an Order Appointing Ms. McPhillips as Chief Probation Officer for the Southern District of Iowa. I attach as Exhibit I a copy of that order.

10. Attached hereto as Exhibit J is a copy of the EEO Plan adopted by the United States District Court, Southern District of Iowa, on February 25, 1987, and in effect at the time Ms. McPhillips was appointed.

11. Attached hereto as Exhibit K is a copy of the "Rules for Processing Complaints against Judges of the Eighth Circuit" in effect at the time Ms. McPhillips was appointed.

12. Before filing this suit, Mr. Duffy never pursued or filed any type of administrative or judicial action involving his allegations in this case.

Further your affiant sayeth naught save that this affidavit is made in support of the defendants' motion to dismiss.

/s/ Charles R. Wolle
CHARLES R. WOLLE

Subscribed and sworn to before me on
this 30 day of April, 1996.

/s/ Nay S. Ryan
NOTARY PUBLIC

[Exhibits A-D, F-G & I-K omitted in printing]

EXHIBIT E

VACANCY ANNOUNCEMENT

POSITION: CHIEF PROBATION OFFICER
SALARY: $56,627 - $101,558
GRADE: JSP 14, 15, 16
LOCATION: Des Moines, Iowa
STARTING DATE: May 2, 1994
CLOSING DATE:
FOR APPLICATIONS: Feb. 15, 1994

DESCRIPTION OF DISTRICT, WORKLOAD AND DUTIES

DISTRICT: The Southern District of Iowa serves 47 counties with three district court judges, 1 senior judge, and two full-time magistrate judges.

PROBATION OFFICE: Authorized staff includes 10 probation officers and 4 clerical positions. There is one PC systems administrator and one administrative analyst.

DUTIES OF THE CHIEF PROBATION OFFICER: Incumbent is responsible in accordance with the applicable statutes of title 18 U.S.C. 3152 and 3602 - 3603 to the district court, the Judicial Conference of the United States, and the Administrative Offices of the United States Courts, and the U.S. Parole Commission for supervision programs in the judicial district.

Duties include but are not limited to the following:

1. Organizes probation office to ensure expeditious and effective handling of investigations and supervision of pretrial cases, probations, parolees, and supervised releases for the courts, parole authorities and institutions;

2. Reviews, analyzes and interprets statutory, Judicial Conference, and Parole Commission requirements for administration of probation and parole services; promulgates policies, procedures and guidelines needed to meet these requirements;

3. Maintains administrative liaison with the court to include promulgating polices, procedures and guidelines, and standards to ensure appropriate level of service delivery to meet the unique needs of the court;

4. Selects and recommends candidates for appointment as probation officers to the court; appoints all clerical personnel; provides recommendations to the court in other personnel matters, such as disciplinary actions and dismissals. Authority in such matters as promotions and salary increases has been delegated to the chief probation officer by the court; determines all personnel are carefully selected and adequately trained and that their performance is systematically evaluated;

5. Supervises all office staff;

6. Prepares estimates of personnel needs and operating budget, solicits and negotiates contracts for substance abuse and mental health aftercare services, and certifies all vouchers for payment; establishes and administers consistent in-service training to ensure high quality service delivery;

8. Maintains system of communication that enables awareness at all levels; delegates decisionmaking responsibility; provides qualitative and quantitative measures of work performance, ensures accountability with minimal interference to service delivery;

9. Maintains liaison with the chief judge and other judges; makes specific recommendations regarding court-related criminal justice issues (emphasis on matters relating to sound sentencing practices);
10. Establishes and maintains cooperative relationships with other probation and pretrial service offices to ensure prompt and effective assistance to their requests;
11. Establishes and maintains cooperative relationships with all components of the criminal justice system to include Federal, state, or local law enforcement, correctional, and social service agencies;
12. Promotes and maintains conditions which encourage staff loyalty, enthusiasm and morale;
13. Develops and maintains a public relations program that explains probation, parole, and other correctional services to the community and assumes responsibility for communicating with news media;
14. Monitors community events and issues with special attention to alleviating hazardous office and field incidents;
15. Performs related duties as required by the Court.

QUALIFICATION REQUIREMENTS: A 4-year degree from an accredited college or university with specialization in one or more of the social sciences appropriate to the position to be filled. An advanced degree in an appropriate area is preferred. In addition, to qualify for the position of chief probation officer, JSP 14, 15, or 16, applicants must possess the following years of specialized experience: JSP 14-6 years specialized experience; JSP

15-7 years specialized, experience JSP 16-8 years specialized experience, 1 year of which must have been at the next lower grade level or its equivalent.

SPECIALIZED EXPERIENCE: Progressively responsible experience, including management responsibility, in the investigation, supervision, counseling, and guidance of offenders in community corrections or pretrial programs, is required. Experience in closely related fields such as educator, guidance counselor, social workers, caseworkers, psychologist,substance abuse counselor, and correctional researcher may satisfy a portion of the specialized experience. Specialized experience must have been earned after the bachelor's degree was granted. Applicants may substitute no more than 2 years of the specialized experience with academic achievement as prescribed by the Judiciary Salary Plan.

APPLICATION PROCESS: Letters of application and resumes for this position must be submitted to James R. Rosenbaum, Clerk of the Court, 123 East Walnut, U.S. Courthouse, Suite 200, Des Moines, Iowa 50309-2040. The person selected to fill the position must undergo a full field background investigation conducted by the Federal Bureau of Investigation. RELOCATION EXPENSES ARE NOT AUTHORIZED.

THE COURT IS AN EQUAL OPPORTUNITY EMPLOYER

EXHIBIT H

1100 St. Croix Heights
Hudson, WI 54016

December 29, 1993

Mr. James R. Rosenbaum
Clerk of the Court
123 East Walnut
U.S. Courthouse, Suite 200
Des Moines, IA 50309-2040

Dear Mr. Rosenbaum:

This is in reference to the Chief Probation Officer position vacancy in the Southern District of Iowa. I am writing to express my interest in the position and am enclosing a resume. I presently hold a supervisory position in the District of Minnesota.

In addition to the resume, I am providing a letter of reference from Chief Probation Officer Glenn Baskfield, and a list of proposed additional references.

Thank you very much for your anticipated consideration.

Sincerely,

/s/ L. Jane McPhillips
L. Jane McPhillips
Supervising U.S. Probation Officer

Enclosures

JANE MCPHILLIPS

Juris Doctor, William Mitchell College of Law
(St. Paul, Minnesota) 1984

Master of Arts, Counseling and Guidance,
University of Minnesota, (Duluth) 1972

Bachelor of Science, Psychology,
Iowa State University (Ames) 1969

1972 to Present UNITED STATES DISTRICT COURTS

Supervising U.S. Probation Officer: June 1990 to present

U.S. Probation Officer, May 1989 to June 1990

District of Minnesota, Minneapolis Headquarters Office

Number of staff supervised: Nine

Responsibilities include assigning and monitoring presentence investigations, conducting personnel evaluations, and providing continuing education or staff on sentencing guidelines, case law and legislation.

U.S. Probation Officer: August 1984 to May 1989

Northern District of Texas, Forth Worth and Arlington

Responsibilities included writing presentence reports and supervising offenders.

Officer in Charge: January 1984 to August 1984

District of Minnesota, St. Paul Office

Number of staff supervised: Three

Responsibilities included assignment of presentence and supervision cases, and general office management

U.S. Probation Officer: December 1972 to January 1984

District of Minnesota, Minneapolis (1972 to 1980) and St. Paul (1980 to 1984).

Responsibilities included writing presentence reports and supervising offenders.

Member of the State Bar of Texas since 1985

Nominee: Users Subgroup on Automated Judgment and Commitment Order, Administrative Office of the Courts (1993)

Member of 13-person national Task Force on Revised Presentence Format (1989 to 1992)

Temporary duty positions with the Administrative Office of the U.S. Courts (1977) and the U.S. Sentencing Commission (1989)

Board Member and President of Project Elan (non-profit treatment program for women felony offenders, 1974 to 1980)

Residence: 1100 St. Croix Heights Home: (715) 386-6526
Hudson, WI 54026 Office: (612) 348-1980

References

The Honorable Diana E. Murphy
Chief U.S. District Judge
Minneapolis, MN
(612) 348-1601

The Honorable Paul A. Magnuson
U.S. District Judge
St. Paul, MN
(612) 290-3967

The Honorable James M. Rosenbaum
U.S. District Judge
Minneapolis, MN
(612) 348-1926

The Honorable Donald D. Alsop
Senior U.S. District Judge
St. Paul, MN
(612) 290-3000

The Honorable Harry H. MacLaughlin
Senior U.S. District Judge
Minneapolis, MN
(612) 348-1951

Glenn Baskfield
Chief U.S. Probation Officer
Minneapolis, MN
(612) 348-1980

Garold T. Ray
Deputy Chief U.S. Probation Officer
Minneapolis, MN
(612) 348-1980

Don Hardaway
Chief U.S. Probation Officer
Dallas, Texas
(214) 767-3019

Supreme Court, U.S.
FILED
APR 24 1998
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(2)

No. 97-1371

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID DUFFY, PETITIONER

v.

CHARLES R. WOLLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
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Counsel of Record

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13 pp

QUESTION PRESENTED

Whether under the facts of this case the court of appeals erred in holding that the district court did not abuse its discretion in denying petitioner's motion for discovery under Rule 56(f) of the Federal Rules of Civil Procedure before ruling upon the motion for summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 123 F.3d 1026. The opinion of the district court (Pet. App. 31-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1997. The court of appeals denied a timely petition for rehearing on October 29, 1997. Pet. App. 49. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1993, the United States District Court for the Southern District of Iowa announced

a vacancy in the position of Chief Probation Officer. The court established a panel of three judges to make the selection from among the applicants, after the applicants were reviewed by a screening committee. The panel was comprised of Chief Judge Charles R. Wolle, Judge Harold D. Vietor, and Judge Ronald E. Longstaff. The screening committee submitted three candidates, including petitioner, to the panel. The panel selected a female applicant, Jane McPhillips. Pet. App. 1-8.

2. Petitioner then brought this civil action against the panel members (respondents here), seeking injunctive and monetary relief. Pet. App. 9.[1] Petitioner claimed that respondents violated his Fifth Amendment due process and equal protection rights by failing to offer him the chief probation officer position. Petitioner asserted that McPhillips was a less qualified candidate and that she was selected based upon her gender. *Ibid.*

Respondents moved to dismiss or in the alternative for summary judgment. Respondents each explained by affidavit that McPhillips was selected for nondiscriminatory reasons. Those reasons included McPhillips's experience, education, and demeanor during her interview, as well as the strong recommendations of jurists familiar with McPhillips's work. Pet. App. 9-10, 22-27.

In response, to support his allegation of discrimination, petitioner alleged that: (1) McPhillips was substantially less qualified; (2) Chief Judge Wolle had

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[1] Petitioner did not seek redress through the administrative process provided for by the Equal Employment Opportunity Plan in place in the Southern District of Iowa. Pet. App. 9, 37-38.

mentioned an interest by someone in the Administrative Office of the United States Courts in the recruitment of a female; and (3) two members of the Panel had usually hired female law clerks. Pet. App. 21. Petitioner also filed an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure, seeking to delay the court's ruling until he could depose respondents to determine whether their stated reasons for hiring McPhillips were pretextual. *Id.* at 71-73.

3. The district court denied petitioner's request to depose respondents, finding that petitioner had not shown that discovery "would aid his case." Pet. App. 47. The court then granted summary judgment in favor of respondents.[2] The court reviewed the evidence submitted by petitioner and found that it did not support a finding of pretext. *Id.* at 46-48.

4. On appeal, the Eighth Circuit affirmed. The court of appeals carefully reviewed all of the record and agreed with the district court that petitioner's submissions did not support a reasonable inference of discrimination. Pet. App. 1-15, 21-28. The court concluded that the case "presents no questions of material fact left in dispute," and "the district court properly granted summary judgment to [respondents]." *Id.* at 28.

The court of appeals also held that the district court did not abuse its discretion in finding that

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[2] The district court denied respondents' claim of absolute immunity. Pet. App. 4, 42. The court also rejected respondents' argument that petitioner's *Bivens* action was precluded under *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), based upon the existence of an alternative remedial scheme and "special factors." Pet. App. 34-39. The court of appeals affirmed the district court's rulings on both of those issues. *Id.* at 12-15.

discovery was not warranted before ruling upon the motion for summary judgment. Pet. App. 28-30. The court explained: "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its pro[t]ections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." Pet. App. 28-29 (quoting *United States* v. *Light*, 766 F.2d 394, 397 (8th Cir. 1985) (per curiam)).

The court of appeals quoted the Rule 56(f) affidavit of petitioner's counsel, which stated that "[u]ntil [petitioner] conducts discovery and specifically has the opportunity to depose each of the Defendants he is not in a position where he can reasonably make a presentation that the Plaintiff's [sic] explanations for their actions are a pretext for unlawful discrimination." Pet. App. 29. The court of appeals agreed with the district court that that bare affidavit was insufficient to postpone the grant of summary judgment. *Id.* at 28-30. The court observed that petitioner "has made no supportable allegations of discrimination, and it is well settled that 'Rule 56(f) does not condone a fishing expedition' where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation." *Id.* at 29-30 (quoting *Gardner* v. *Howard*, 109 F.3d 427, 431 (8th Cir. 1997). Thus, the court of appeals concluded, "the district court did not abuse its discretion in declining to compel discovery in this case." *Id.* at 30.

ARGUMENT

The court of appeals correctly affirmed the grant of summary judgment for respondents. The court of appeals' ruling on that point is fact-bound and does not raise any issue of law warranting this Court's review. Nor does the court of appeals' approach to Rule 56(f) of the Federal Rules of Civil Procedure conflict with the decision of any other court of appeals. Accordingly, certiorari should be denied.

1. The court of appeals properly concluded that petitioner's submissions were insufficient to support his claim of sex discrimination, and properly affirmed the district court's grant of summary judgment. Respondents each submitted affidavits explaining the legitimate nondiscriminatory reasons why Ms. McPhillips was considered a more qualified candidate than petitioner. In response, petitioner could not adequately support his allegation of sex discrimination.

Petitioner relied upon three allegations as demonstrating sex discrimination: "(1) McPhillips was substantially less qualified than [petitioner]; (2) Chief Judge Wolle had mentioned an interest by someone in the Administrative Office in the recruitment of a female; and (3) two members of the Panel had usually hired female law clerks." Pet. App. 21. As to the first allegation, the court of appeals held that the record did not support the claim that McPhillips was less qualified than petitioner. *Id.* at 22-23. The court agreed that, under appropriate non-discriminatory criteria, "McPhillips was the stronger candidate." *Id.* at 23.

As to the second allegation, the district court explained that the evidence submitted by petitioner "shows only that [respondents] were encouraged [by

the Administrative Office] to conduct a sufficiently comprehensive search that women and minority candidates were represented in the applicant pool." Pet. App. 48 n.6. The court of appeals correctly held that "the Administrative Office's alleged interest in obtaining a diverse pool of applicants can[not] support a finding of pretext," *id.* at 23, because "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination," *id.* at 24. See also *id.* at 25-26 ("An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. * * * This, of course, is not an appropriate objection * * * and does not state a cognizable harm.") (internal quotation marks and citations omitted).

Finally, the court correctly held that petitioner's assertion that two of the respondents had hired more female judicial law clerks than male judicial law clerks did not support his claim of sex discrimination by the three-member panel in selecting the Chief Probation Officer. Pet. App. 25-26.

Thus, the court of appeals' decision here is correct. Moreover, it does not establish any significant legal precedent warranting this Court's review, and it does not conflict with the ruling of any other court.

2. The court of appeals also properly held that the district court's denial of petitioner's request to depose respondents was not an abuse of discretion. Under Rule 56(f) of the Federal Rules of Civil Procedure, a party may seek to postpone the ruling on a motion for summary judgment by demonstrating that discovery is necessary in order to oppose the motion. The courts of appeals agree that a Rule 56(f) affidavit

must explain "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Meloff* v. *New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995). Here the Rule 56(f) affidavit contained none of those required elements. Instead, it was a conclusory request to depose respondents. Such a "fishing expedition" is not appropriate under any standard.

The alleged circuit conflict on the interpretation of Rule 56(f) (see Pet. 15-17) is wholly illusory. As an initial matter, the court of appeals here did not purport to be adopting any general interpretation of Rule 56(f). Rather, the court simply held that on the record of this case, it was not an abuse of discretion for the district court to deny the depositions and rule upon the summary judgment motion.

The reasoning of the cases cited by petitioner does not conflict with the ruling below. For example, in *Evans* v. *Technologies Applications & Service Co.*, 80 F.3d 954, 961 (4th Cir. 1996), cited by petitioner (Pet. 16), the court explained that "[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." 80 F.3d. at 961. See also *Wichita Falls Office Assoc.* v. *Banc One Corp.*, 978 F.2d 915, 920 (5th Cir. 1992) ("It is clear that the non-moving party may not rely merely on vague assertions that discovery will produce some unrelated, unspecified facts."). In the other cases cited by petitioner, where allowance was made for discovery, the party opposing summary

judgment filed an adequate affidavit explaining what facts were sought, and how they would be obtained. See *e.g.*, *Vance* v. *United States*, 90 F.3d 1145, 1150 (6th Cir. 1996) ("[The party opposing summary judgment] provided all of the information required by [Rule 56(f)]. Dr. Vorhous set forth precisely what discovery was needed and why it was needed, all based on a meticulous review of Vance's medical records.").[3]

Here, in contrast, petitioner had no legitimate basis for his sex discrimination claim, and his Rule 56(f) affidavit contained only a conclusory statement that the deposition of respondents would allow him to show that the stated legitimate reasons for the hiring of McPhillips were pretextual. Pet. App. 72. In these circumstances, it was not an abuse of discretion to deny the depositions.

3. Contrary to petitioner's contention, neither the court of appeals nor the district court employed special rules, beyond the Federal Rules of Civil Procedure, in denying further discovery here. The district court cited this Court's statement that a "firm application of the Federal Rules" is appropriate when public officials are sued in their individual capacities. Pet. App. 48 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)). The court of appeals agreed with that proposition, and noted that the same policies that support the firm application of the Federal Rules when other public officials are sued apply when judges

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[3] One case cited by petitioner, *Burns* v. *Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990), does not even discuss Rule 56(f). Rather, the court held that there was direct evidence of discrimination that supported the plaintiff's claims, and that, therefore, the grant of summary judgment for the defendants was improper.

are named as defendants. Pet. App. 27-28. Neither court, however, purported to apply special rules to this case.[4] The district court and court of appeals applied Rule 56 and held that there was no material issue of fact presented and that petitioner's affidavit did not warrant delay in the ruling on the motion to permit petitioner to depose respondents. The decisions below regarding the application of Rule 56 are both correct and do not present any issue of law that warrants review by this Court.[5]

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[4] The question of what rules (regarding discovery, Rule 56(f), and standards of proof) apply in motive-based cases where the defendant asserts qualified immunity is currently pending before this Court in *Crawford-El* v. *Britton*, No. 96-827 (argued Dec. 1, 1997).

[5] The court of appeals rejected respondents' argument that petitioner's *Bivens* claim was precluded under *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), based upon the existence of an alternative remedial scheme and "special factors." We disagree with the court of appeals' ruling on that issue. Congress has vested the coordinate Judicial Branch with the primary responsibility for administering its personnel matters. Under that authority, the District Court for the Southern District of Iowa has established an administrative process for the presentation, investigation and resolution of claims of discrimination. If an aggrieved employee is successful in pursing such a claim, the employee may obtain equitable relief, and may, in some instances, also be entitled to monetary relief under the Back Pay Act. Thus, the court of appeals' decision could be affirmed on the ground that a *Bivens* claim is precluded in this context. We note that the same issue is currently pending in at least two other circuits. See *Lee* v. *Hughes*, No. 97-8423 (11th Cir.); *DeMello* v. *Ney*, No. 97-15205 (9th Cir.); *Blankenship* v. *McDonald*, 97-35898 (9th Cir.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
ROBERT M. LOEB
Attorneys

APRIL 1998